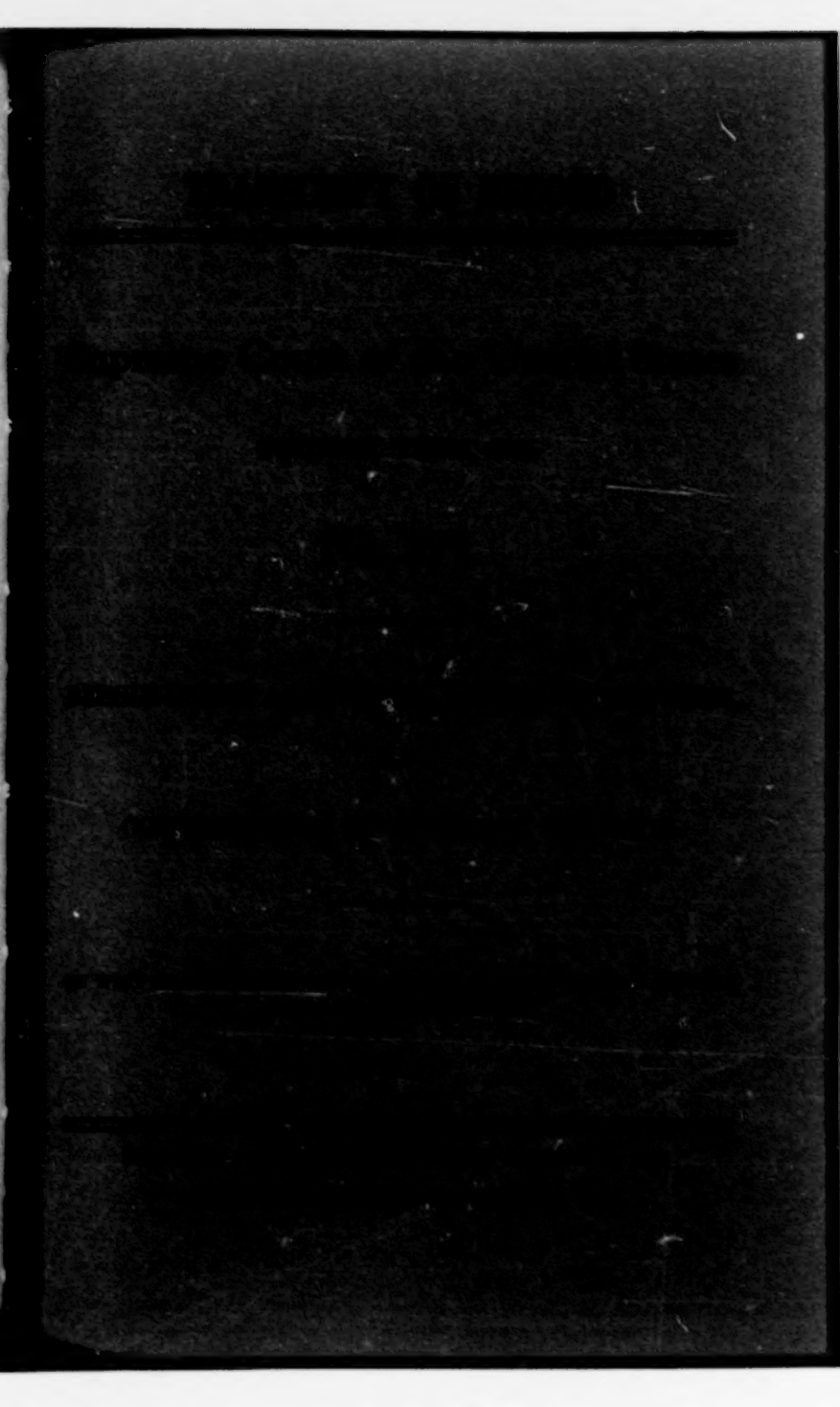

No. 14868

United States
Court of Appeals
for the Ninth Circuit

BESSIE LASKY and JESSE L. LASKY,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petitions to Review Decisions of The Tax Court
of the United States

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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The Tax Court of the United States

Docket No. 26397

JESSE L. LASKY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

APPEARANCES

For Petitioner:

Herschel B. Green, Esq.
Harrison Harkins, Esq.
Robert Ash, Esq.
Carl F. Bauersfeld, Esq.

For Respondent:

W. Lee McLane, Jr., Esq.
R. H. Transue, Esq.

DOCKET ENTRIES

1950

Jan. 9—Petition received and filed. Taxpayer notified. Fee paid.

Jan. 9—Copy of petition served on General Counsel.

Feb. 28—Answer filed by General Counsel.

Feb. 28—Request for hearing in Los Angeles, California filed by General Counsel.

Mar. 2—Notice issued placing proceeding on Los Angeles, California calendar. Service of answer and request made.

1951

Oct. 8—Hearing set December 3, 1951, Los Angeles, California.

1951

Dec. 10/11—Hearing had before Judge Harron, on merits, on petitioner's motion to consolidate with docket 26396 for hearing, granted. Appearance of Harrison Harkins and stipulation of facts filed. Briefs due February 11, 1952. Replies due March 12, 1952.

1952

Jan. 4—Transcript of hearing 12/10/51 filed.

Jan. 4—Transcript of hearing 12/11/51 filed.

Jan. 8—Amendment to answer filed by respondent. 1/9/52 Copy served.

Jan. 21—Reply to respondent's amendment to answer filed by petitioner. Copy served.

Feb. 7—Brief filed by taxpayer.

Feb. 8—Motion for extension to March 11, 1952 to file brief filed by General Counsel. 2/11/52 Granted.

Mar. 4—Motion for extension to March 26, 1952 to file brief filed by General Counsel. 3/5/52 Granted.

Mar. 26—Brief filed by General Counsel.

Mar. 27—Taxpayer's brief served on General Counsel.

Apr. 3—Motion for extension to May 12, 1952 to file reply brief filed by taxpayer. 4/7/52 Granted.

Apr. 28—Memorandum reply brief filed by General Counsel.

1952

May 12—Reply brief filed by taxpayer. Copy served.

1954

Apr. 8—Findings of fact and opinion rendered, Harron, Judge. Decision will be entered for the respondent. Copy served 4/8/54.

Apr. 8—Decision entered, Harron, Judge, Div. 13.

Aug. 24—Entry of appearance of Robert Ash as counsel filed.

Aug. 24—Motion for leave to file motion to vacate decision out of time, motion to vacate decision lodged, filed by petitioner.

Aug. 26—Copy of motion for leave to file motion of 8/24/54 and motion to vacate served on General Counsel.

Aug. 26—Motion for leave to file motion to vacate decision granted, motion to vacate decision filed.

Aug. 26—Order, that this proceeding be placed on September 13, 1954, Washington, D. C. calendar, in Div. 13 for hearing on petitioner's motion, entered.

Aug. 27—Hearing set 9/13/54, Washington, D. C., on petitioner's motion to vacate decision.

Sept. 10—Affidavits in support of motion to vacate decision filed 8/24/54 filed by taxpayer. Copy served.

Sept. 14—Hearing had before Judge Harron, on petitioner's motion to vacate decision, objection by respondent, respondent's motion

1954

to file memorandum of authorities filed. Copies served. Petitioner's motion to vacate, C.A.V. Petitioner has until October 11, 1954 to file reply to respondent's memorandum of authorities. Memorandum of authorities filed at hearing. Petitioner's reply brief due October 11, 1954.

Sept. 16—Hearing had before Judge Harron, on written motion to vacate decision. Objection by respondent.

Sept. 20—Transcript of hearing 9/14/54 filed.

Sept. 20—Transcript of hearing 9/16/54 filed.

Oct. 11—Motion for leave to file an amendment to the motion to vacate decision out of time, amendment to the motion to vacate decision lodged, filed by taxpayer.

Oct. 11—Statement of facts in support of motion to vacate decision and for rehearing filed by taxpayer.

Oct. 11—Brief in support of motion to vacate decision filed by taxpayer. 10/15/54 Copy served on respondent.

Oct. 15—Motion for leave to file an amendment to the motion to vacate decision out of time, granted, amendment to the motion to vacate decision filed by taxpayer.

Dec. 13—Order, that proceeding be placed on a special calendar in Washington, D. C. before Div. 13 on 1/17/55 for further hearing, further order that the decision en-

1954

tered April 8, 1954 be vacated and set aside for the purpose of granting petitioner a further hearing on the merits, entered.

Dec. 14—Hearing set January 17, 1955, Washington, D. C.

Dec. 16—Motion for review by entire Court of order purporting to vacate final decision filed by General Counsel. Denied. (Copy served on Robert Ash personally).

Dec. 16—Motion to vacate order purporting to vacate final decision filed by General Counsel. 12/21/54 Denied.

1955

Jan. 17—Hearing had before Judge Harron, on further hearing. Continued to 1/21/55 at Washington, D. C. Appearance of Carl F. Bouersfeld, Esq., filed at hearing.

Jan. 17—Order, that said further hearing is continued to 1/21/55 at Washington, D. C., entered.

Jan. 19—Hearing set 1/21/55, Washington, D. C.

Jan. 21/26—Hearing had before Judge Harron, on the merits and further hearing. Petitioner's brief due 2/25/55. Respondent's brief due 3/25/55.

Jan. 24—Transcript of hearing 1/17/55 filed.

Feb. 8—Transcript of hearing 1/21/55 filed.

Feb. 8—Transcript of hearing 1/26/55 filed.

1955

Feb. 24—Brief on rehearing filed by taxpayer. Copy served.

Mar. 18—Memorandum filed by General Counsel.

Jun. 30—Order and decision entered, Judge Harron, Div. 13, with attached memorandum sur order and decision.

Aug. 10—Petition for review by U. S. Court of Appeals, Ninth Circuit, filed by taxpayer.

Aug. 10—Proof of service filed.

Aug. 16—Agreed designation of record filed by taxpayer.

Aug. 29—Certified copy of order from U. S. Court of Appeals, Ninth Circuit consolidating dockets 26396 and 26397 for preparation of record, hearing and disposition filed.

Aug. 30—Designation of additional portions of record filed by General Counsel.

Aug. 31—Supplemental designation of additional portions of record filed by General Counsel.

Aug. 31—Statement of service of designation of additional portions of record and supplemental designation of additional portions of record and agreement with said designations filed.

[Title of Tax Court and Cause No. 26397.]

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of delinquency (Bureau symbols LA:IT:90D:CTF) dated November 28, 1949, and as a basis for his proceedings alleges as follows:

1. The petitioner is an individual whose address is care of Wright, Wright, Green and Wright, 111 West Seventh Street, Los Angeles 14, California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on November 28, 1949.

3. The taxes in controversy are income and victory taxes for the taxable year ended December 31, 1943 in the sum of $224,515.14, all of which is in controversy. The collection district in which the return was filed was the sixth district at Los Angeles, California.

4. The determination of tax set forth in the notice of deficiency is based upon the following errors:

(a) The Commissioner erred in taxing as ordinary income received in the calendar year 1942 the sum of $402,500.00 representing the proceeds from a contractual interest in the earnings and profits of the motion picture "Sergeant York" received by petitioner from United Artists Corporation on December 4, 1942.

(b) The Commissioner erred in failing to deter-

mine that the sum of $402,500.00 received by petitioner on December 4, 1942 representing the proceeds from the sale of a contractual interest in the earnings and profits of the motion picture "Sergeant York" to United Artists Corporation on December 4, 1942 constituted income derived from the sale of a capital asset owned and held by petitioner in excess of two years and therefore taxable as a long-term capital gain.

(c) The Commissioner erred in his failure to determine that the sale by petitioner of his contractual interest in the earnings and profits of the motion picture "Sergeant York" to United Artists Corporation on December 4, 1942 constituted a sale of a capital asset owned and held by petitioner in excess of two years.

Statement of Facts

The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) On March 23, 1940 petitioner entered into an agreement with Sergeant Alvin C. York wherein petitioner purchased from the said York the sole and exclusive motion picture, radio, television and dramatic rights in and to

(i) "Sergeant York and His People," by Sam K. Cowan, copyright 1922 by Funk and Wagnalls Company.

(ii) "Sergeant York, Last of Long Hunters", by Tom Skeyhill, copyright 1930 by The John C. Winston Company.

(iii) "The War Diary of Sergeant York," copyright by Doubleday Doran Company, Incorporated.

(b) On May 15, 1940 petitioner entered into an agreement and supplemental agreement with Warner Bros. Pictures whereunder Warner Bros. Pictures purchased from petitioner all of his right, title and interest in and to the agreement of March 23, 1940 entered into with Sergeant Alvin C. York.

(c) Under the terms of the supplemental agreement of May 15, 1940 between petitioner and Warner Bros. Pictures, Warners agreed to pay petitioner as additional compensation for the rights so acquired, 20 per cent of the gross of said contemplated motion picture over and above $1,600,000, 20 per cent of the gross of any foreign income from such picture over and above $150,000 and 25 per cent of the total gross over and above the sum of $2,500,000.

(d) Warner Bros. Pictures thereafter produced the motion picture entitled "Sergeant York" based upon the literary properties and rights acquired under the agreement of March 23, 1940, which said motion picture was first released in the summer of 1941.

(e) On December 4, 1942 petitioner sold to United Artists Corporation all of his right, title and interest in and to any income from said motion picture arising under the supplemental agreement with Warner Bros. Pictures dated May 15, 1940 for $805,000.

(f) Petitioner and Bessie Lasky, his wife, were residents of California during the years 1942 and

1943 and all income derived from the sale to United Artists Corporation was the community income of petitioner and his said wife.

Wherefore petitioner prays that this Court may hear the proceeding and determine—

(a) That there is no deficiency in petitioner's 1943 income tax.

(b) Such other and further relief as this Court may deem proper.

Dated Los Angeles, California, December 31st, 1949.

WRIGHT, WRIGHT, GREEN and WRIGHT,

/s/ By HERSCHEL B. GREEN,
Counsel for Petitioner

Duly Verified.

EXHIBIT A

Treasury Department, Internal Revenue Service,
417 South Hill Street, Los Angeles 13, California.
Nov. 28, 1949

Office of Internal Revenue Agent in Charge, Los Angeles Division. LA:IT:90D:CTF

Mr. Jesse L. Lasky, c/o Wright & Millikan
111 W. Seventh St., Los Angeles 14, Calif.

Dear Mr. Lasky:

You are advised that the determination of your income tax and victory tax liability for the taxable

year ended December 31, 1943 discloses a deficiency of $224,515.14, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner

By GEORGE D. MARTIN,
Internal Revenue Agent in Charge

Enclosures: Statement, Form of waiver.

STATEMENT

Tax Liability for the Taxable Year Ended December 31, 1943

	Deficiency
Income and victory tax	$224,515.14

In making this determination of your income and victory tax liability careful consideration has been given to the report of examination dated November 19, 1946, to your protest dated February 28, 1947, and to the statements made at the conferences held.

A copy of this letter and statement has been mailed to your representative, Mr. Loyd Wright, 111 West Seventh Street, Los Angeles 14, California, in accordance with the authorization contained in the power of attorney executed by you.

ADJUSTMENTS TO NET INCOME
Taxable Year Ended December 31, 1942

Net income as disclosed by return	$197,172.89
Additional income:	
(a) Proceeds from a contractual interest	402,500.00
Total	$599,672.89
Reduction of income:	
(b) Net gain from the sale or exchange of capital assets decreased	201,250.00
Net income adjusted	$398,422.89

EXPLANATION OF ADJUSTMENTS

(a) It has been determined that $805,000.00 representing the proceeds from a contractual interest in the earnings and profits of the motion picture "Sergeant York" received from United Artists

Corporation on December 4, 1942, is taxable as ordinary income received in the calendar year 1942.

On a community property basis, one-half of this sum, or $402,500.00 is taxable to you, and the remaining one-half of $402,500.00 is taxable to your wife, Bessie Lasky.

(b) The net long-term capital gain included in your return in the amount of $201,250.00 (50%) from "Int. in picture "Sergeant York" is eliminated from your income as a result of adjustment (a) above.

COMPUTATION OF TAX
Taxable Year Ended December 31, 1942

Net Income Adjusted		$398,422.89
Less: Personal exemption		600.00
Balance (surtax net income)		$397,822.89
Less: Earned income credit		1,400.00
Net income subject to normal tax		$396,422.89
Normal tax at 6% on $396,422.89	$ 23,785.37	
Surtax on $397,822.89	301,354.77	
Correct income tax liability		$325,140.14

NET INCOME
Taxable Year Ended December 31, 1943

The Income Tax net income reported in your return in the amount of $15,075.86 and the Victory Tax net income reported in the amount of $45,877.64 have been accepted as correct.

COMPUTATION OF INCOME AND VICTORY TAX—CURRENT TAX PAYMENT ACT OF 1943
Taxable Year Ended December 31, 1943

Income tax net income	$ 15,075.86
Less: Personal exemption	600.00
Surtax net income (Forwarded)	$ 14,475.86
Less: Earned income credit	1,400.00
Income subject to normal tax	$ 13,075.86

Normal tax at 6 per cent on $13,075.86	$ 784.55	
Surtax on $14,475.86	3,570.34	
Total income tax		4,354.89
Net income tax		4,354.89
Victory tax net income	$ 45,877.64	
Less: Specific exemption	624.00	
Income subject to victory tax	$ 45,253.64	
Victory tax before credit (5% of $45,253.64)	$ 2,262.68	
Less: Victory tax credit—limited to	500.00	
Net victory tax		$ 1,762.68

1. Net income tax and victory tax		$ 6,117.57
2. Income tax for 1942		325,140.14
3. Amount of item 1 or 2, whichever is larger		325,140.14
4. Forgiveness feature:		
(a) Amount of item 1 or 2, whichever is smaller	$6,117.57	
(b) Amount forgiven (¾ of (a))	4,588.18	
(c) Amount unforgiven		1,529.39
5. Correct income and victory tax liability (item 3 plus item 4(c))		$326,669.53
6. Income and victory tax liability shown on return, account No. 352679		102,154.39
7. Deficiency of income and victory tax		$224,515.14

[Endorsed]: T.C.U.S. Filed January 9, 1950.

[Title of Tax Court and Cause No. 26397.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are income and victory taxes for the taxable year ended December 31, 1943. Further admits that the return was filed in the Sixth Collection District at Los Angeles, California. Denies the remaining allegations contained in paragraph 3 of the petition.

4 (a) to (c), inclusive. Denies the allegations of error contained in subparagraphs (a) to (c), inclusive, of paragraph 4 of the petition.

Statement of Facts

(a) Admits the allegations contained in paragraph (a) appearing on page 3 of the petition under petitioner's Statement of Facts.

(b) Admits that petitioner subsequently entered into an agreement and supplemental agreement with Warner Bros. Pictures. Denies the remaining allegations contained in paragraph (b) of petitioner's Statement of Facts.

(c) Denies the allegations contained in paragraph (c) of petitioner's Statement of Facts.

(d) For lack of information sufficient to form a belief as to the truth or correctness thereof, denies the allegations contained in paragraph (d) of petitioner's Statement of Facts.

(e) Admits that petitioner assigned to United Artists Corporation his right to the income from the motion picture entitled "Sergeant York", and received therefor the sum of $805,000. Denies the remaining allegations contained in paragraph (e) of the petitioner's Statement of Facts.

(f) Admits that petitioner and Bessie Lasky, his wife, were residents of California during the years 1942 and 1943 and the income received from United Artists Corporation was the community income of petitioner and his said wife. Denies the remaining allegations contained in paragraph (f) of petitioner's Statement of Facts.

5. Denies each and every allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ CHARLES OLIPHANT ECC
Chief Counsel, Bureau of Internal Revenue

Of Counsel:
B. H. Neblett, Division Counsel
E. C. Crouter,
A. J. Hurley,
Special Attorneys, Bureau of Internal Revenue

[Endorsed]: T.C.U.S. Filed February 28, 1950.

[Title of Tax Court and Cause No. 26397.]

AMENDMENT TO ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, Mason B. Leming, Acting Chief Counsel, Bureau of Internal Revenue, in accordance with permission granted by the Court at the hearing, amends his answer heretofore filed by adding immediately after paragraph 5, the following allegation:

6. That in the event the Court should hold contrary to respondent's determination that the transfer by Lasky on December 4, 1942, to United Artists of his right to receive income, respondent alleges that Lasky either actually received or constructively received the amount of $570,698.62 as his share in the earnings of a motion picture "Sergeant York" from Warner Brothers Pictures, Inc., prior to December 4, 1942.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ MASON B. LEMING, REM
Acting Chief Counsel, Bureau of
Internal Revenue

Of Counsel:
B. H. Neblett, Division Counsel.
R. E. Maiden, Jr.,
W. Lee McLane, Jr.,
Special Attorneys, Bureau of Internal Revenue

[Endorsed]: T.C.U.S. Filed January 8, 1952.

[Title of Tax Court and Cause No. 26397.]

REPLY

The above named petitioner replies to the allegations affirmatively set out by the respondent in his Amendment to Answer filed January 8, 1952, and admits and denies as follows:

6. Admits that prior to December 4, 1942, namely, during the year 1941, Jesse L. Lasky actually received the total sum of $196,216.80 from Warner Bros. Pictures, Inc., with respect to his share in the proceeds of the motion picture "Sergeant York". Denies that Lasky either actually received, or that he constructively received, the amount of $570,-698.62, or any other amount in excess of that hereinabove admitted, as his share in the earnings of the motion picture "Sergeant York" from Warner Bros. Pictures, Inc., prior to December 4, 1942. Denies that Lasky either actually received or constructively received any monies during 1942 from Warner Bros. Pictures, Inc., with respect to the earnings or proceeds of the picture "Sergeant York".

Wherefore it is prayed that the determination and prayer of the respondent be denied.

/s/ HARRISON HARKINS,
Counsel for Petitioner

[Endorsed]: T.C.U.S. Filed January 21, 1952.

The Tax Court of the United States

Docket No. 26397—Jessie L. Lasky, Petitioner, vs. Commissioner of Internal Revenue, Respondent.
Docket No. 26396—Bessie Lasky, Petitioner, vs. Commissioner of Internal Revenue, Respondent.

STIPULATION OF FACTS

The parties to this consolidated proceeding, through their respective counsel of record, hereby stipulate that the following facts are true and may be found as facts by the Court, subject to the right of either party to enter objections on the grounds of relevancy or materiality, and the right of either party to present other items of proof, either related or unrelated to the facts herein stated but not inconsistent therewith.

I.

Each of the petitioners is an individual residing at 181 North Saltair, Brentwood Highlands, Los Angeles, California. Each filed a separate income tax return for the calendar year 1942, and separate income and victory tax return for the calendar year 1943 with the Collector for the Sixth California District. The taxes in controversy are the income and victory tax liabilities for the calendar taxable year 1943. The respondent's notice of deficiency was mailed to each petitioner on November 28, 1949.

II.

At all times material to this proceeding each of the petitioners was a resident of the State of Cali-

fornia; and the income received by them was community property income.

III.

At all times material to this proceeding each of the petitioners reported income and deductions for income tax purposes on the cash receipts and disbursements method of reporting.

IV.

On March 23, 1940, Jesse L. Lasky (hereinafter sometimes referred to as Lasky) entered into a contract with Sergeant Alvin C. York, and a complete and correct copy of the contract is attached hereto as Exhibit 1-A and made a part of this Stipulation.

V.

Lasky made an Agreement with Warner Bros. Pictures, Inc., a correct copy of which is attached hereto as Exhibit 2 and made a part of this Stipulation.

VI.

Lasky entered into an agreement, entitled "Supplemental Agreement", with Warner Bros. Pictures, Inc., and a complete and correct copy of the agreement is attached hereto as Exhibit 3 and made a part of this Stipulation.

VII.

With respect to the agreements referred to in Paragraphs V and VI of this Stipulation, the respondent specifically reserves the right to question whether the agreements, or either of them, were in

fact entered into on the dates shown therein, and whether the parties entered into other agreements covering the same subject matter.

VIII.

Warner Bros. Pictures, Inc. produced, distributed and exhibited a motion picture entitled "Sergeant York", which motion picture is the picture or photoplay referred to in the agreement, entitled "Supplemental Agreement", mentioned in Paragraph VI of this Stipulation. The first release date of the photoplay in the United States and Canada was in July of 1941.

IX.

Under date of December 30, 1941, Lasky entered into a letter agreement with Warner Bros. Pictures, Inc. amending the agreement, entitled "Supplemental Agreement", referred to in paragraph VI of this Stipulation. A complete and correct copy of the letter agreement is attached hereto as Exhibit 4 and made a part of this Stipulation.

X.

Under date of December 31, 1941, Lasky entered into a letter agreement with Warner Bros. Pictures, Inc. amending the agreement, entitled "Supplemental Agreement", referred to in paragraph VI of this Stipulation, and amending the letter agreement referred to in paragraph IX of this Stipulation. A complete and correct copy of the letter agreement dated December 31, 1941 is attached

hereto as Exhibit 5 and made a part of this Stipulation.

XI.

Lasky received in 1941 from Warner Bros. Pictures, Inc. the sums of $85,000.00, $90,000.00, and $21,216.80 referred to in the letter agreements dated December 30, 1941 and December 31, 1941.

XII.

Under date of April 30, 1942, Lasky entered into a letter agreement with Warner Bros. Pictures, Inc. amending the agreement, entitled "Supplemental Agreement", (as amended) referred to in Paragraph VI of this Stipulation. A complete and correct copy of the letter agreement is attached hereto as Exhibit 6 and made a part of this Stipulation.

XIII.

On December 4, 1942, Lasky entered into an agreement, entitled "Contract of Sale", with United Artists Corporation, and a complete and correct copy of the agreement is attached hereto as Exhibit 7-B and made a part of this Stipulation.

XIV.

The petitioners received in 1942 from United Artists Corporation the sum of $805,000.00 mentioned in the agreement referred to in paragraph XIII of this Stipulation; and each petitioner reported $402,500.00 of the sum as long-term capital

gain on his or her income tax return filed with respect to the calendar year 1942.

Respectfully submitted,

/s/ HARRISON HARKINS,
Counsel for Petitioners
/s/ MASON B. LEMING,
Acting Chief Counsel, Bureau of Internal Revenue

JOINT EXHIBIT 1-A

[Joint Exhibit 1-A admitted in evidence December 10, 1951]

This Contract made and entered into on this the 23rd day of March, 1940 between Jesse L. Lasky, hereinafter for convenience referred to as "Lasky" and Sergeant Alvin C. York, hereinafter for convenience referred to as "York".

Witnesseth: Whereas the parties hereto each desire to enter into an agreement upon the terms and conditions hereinafter set forth.

Now, Therefore, in consideration of the provisions and agreements hereinafter contained, the parties do agree for themselves and their and each of their respective heirs, executors, administrators and assigns, as follows:

I. York hereby gives, grants, bargains, sells, assigns and sets over unto Lasky, his heirs, executors, administrators and assigns, the sole and exclusive motion picture, radio, television and dramatic rights in and to the following published books (hereinafter

Exhibit 1-A—(Continued)

for convenience referred to in the aggregate as "The Works"):

(a) "Sergeant York and His People", by Sam K. Cowan, copyright 1922 by Funk and Wagnalls Company.

(b) "Sergeant York, Last of Long Hunters", by Tom Skeyhill, copyright 1930 by The John C. Winston Company.

(c) "The War Diary of Sergeant York", copyright by Doubleday Doran Company, Incorporated

including the theme thereof and all material therein contained, together with all now or hereafter existing rights of every kind and character whatsoever pertaining to said works, whether or not such rights are now known, recognized or contemplated, and the complete and unconditional and unencumbered title in and to said works for all purposes whatsoever.

Without limiting the generality of the foregoing or any other provision of this agreement the term "Motion Picture Rights" as herein used shall mean and be deemed to include the sole and exclusive world wide sound and silent motion picture, radio, television and dramatic rights and the right to transmit or present the said works in whole or in part by every visual and/or audible means whether now known or hereafter invented or discovered. Such transmission or presentation may be through the use or by means of living actors in the actual and immediate presence of an audience or by any other and different means, medium or device of whatsoever nature or description.

Exhibit 1-A—(Continued)

Said rights shall also include the sole and exclusive publication, novelization and serialization rights in "The War Diary of Sergeant York" referred to in paragraph (c) above and shall include, as well, the novelization and serialization rights in the works referred to in paragraphs (a) and (b) above, but shall not include the right to print or sell the two last mentioned works.

Any royalties actually received by Lasky from the exercise of the publication rights in the "War Diary of Sergeant York" shall promptly upon the receipt thereof be paid to York.

It is understood and agreed that if York hereafter acquires any other or further rights in the works referred to in paragraphs (a) and (b) above, he will promptly thereon transfer, set over and assign such rights to Lasky. Lasky agrees that he will thereafter pay to York any sums received by him from the sale of said works and that he will reconvey to York without the payment by York of any consideration, the publication rights in all of the works above referred to not later than three (3) years after the date hereof nor later than two (2) years after the first general release of such photoplay as may be made hereunder, whichever of said periods of time shall be the longer.

II. York further gives, grants, bargains, sells, assigns and sets over unto Lasky, his heirs, executors, administrators, and assigns, the sole and exclusive right to use the name and likeness of York

Exhibit 1-A—(Continued)

in connection with one or more story or stories, films or photoplays for motion picture, television and/or radio presentation and/or exhibitions based upon or using or containing one or more incidents in, of or from the life of York, including the right to dramatize, exhibit and/or present any incident occurring or which did occur in the life of York by every visual and/or audible means whether now known or hereafter invented or discovered. Such transmission or presentation may be through the use or by means of living actors in the actual and immediate presence of an audience or by any other and different means, medium or device of whatsoever nature or description.

The name "Alvin C. York" or any part thereof, whether alone or in connection or in conjunction with any other word or phrase may, but need not be used in the title or sub-title of any motion picture, play, story, novel or serial or radio or television presentation, fictional or otherwise, containing any one or more incidents in, of or from the life of York, and the advertising and/or publicity relating to any motion picture, play, story, novel, serial or radio or television presentation written, made or produced pursuant to this agreement, whether fictional or otherwise, may include the statement that it is based upon, taken from or is the story of the life of Alvin C. York, or some similar statement.

III. York warrants and represents that he has

Exhibit 1-A—(Continued)

not heretofore sold, conveyed or encumbered the rights herein granted, that he is the sole owner of the same, and that he will not hereafter sell, convey or encumber the said rights or any of them in contravention of this agreement.

IV. York agrees that he will render such services for Lasky as writer, collaborator, director or technical advisor, as shall be requested of him for a period not in excess of two (2) years during and/or prior to the filming of any photoplay made hereunder, which said services shall be rendered without any additional compensation to York other than as set forth in Paragraph VII of this agreement.

York agrees to render such other and further similar services at such time or times and such place or places as may be requested by Lasky during or prior to the filming of any photoplay made hereunder for which such services he shall be paid by Lasky the sum of Five Hundred ($500.00) Dollars per week for each week such services are so rendered by him during or prior to the filming of any photoplay made hereunder.

Such salary shall be paid pro-rata for all services rendered by York for a period of less than one week and for the purposes of such pro-ration, a week shall be deemed to consist of six (6) days.

York further agrees that he will not render his personal services to any motion picture company or producer other than Lasky in any capacity whatsoever for a period commencing with the date hereof

Exhibit 1-A—(Continued)

and ending three (3) years after the first general release of any photoplay made hereunder, without the written consent of Lasky first having been obtained.

York further agrees that he will not render his services to any radio or television company or sponsor or any other person, firm or corporation in connection with a presentation of any one or more incidents of his life's story in any manner which might compete with or impair the full enjoyment by Lasky of the rights granted hereunder.

Nothing herein contained shall be construed as making the period during which York may be required to render personal services to Lasky hereunder, including all possible extensions of such period, extend, or the provisions hereof with reference to such personal services, be enforcible against York belong the term of seven (7) years, from the commencement of services hereunder. Should any provision hereof be held unlawful or in contravention of public policy, such provision or provisions shall be deemed severable or limited so far as may be necessary to become lawful and in accord with public policy, and the parties agree to be bound by the balance of this contract, notwithstanding any such severance or limitation.

V. York further agrees to execute such and any further documents and agreements as shall in Lasky's discretion be deemed necessary or desirable to effectuate the purposes of this agreement or to

Exhibit 1-A—(Continued)

vest in Lasky or his nominee the rights herein granted. Without in any way limiting the generality of the provisions of this Paragraph of this agreement, York agrees to assign or cause to be assigned to Lasky any and all copyrights on the work referred to in Paragraph I. of this agreement, but only, however, for the uses specified in this agreement.

VI. It is understood and agreed that in portraying incidents for presentation in dramatic form, deviation from exact fact and the inclusion of fictional narrative, scenes or treatment is often important to the development of a dramatic story; and in the preparation and/or filming of any motion picture, drama, novel or serial or television or radio presentation pursuant to this agreement, York consents to such deviation and the inclusion of fictional scenes or treatment, provided, however, that in filming or depicting the battle of the Argonne reasonable regard shall be had to authenticity, and the same shall be based substantially upon the report of York's part therein contained in the Congressional Record and/or the books described in sub-paragraphs (b) and (c) of Paragraph I of this agreement.

VII. As full and final consideration for the rights herein granted by York and conditional upon the performance by York of each and every obligation of this agreement encumbent upon him to be

Exhibit 1-A—(Continued)

performed, Lasky agrees to pay to York the following sums of money at the following times:

(a) Twenty-five Thousand ($25,000.00) Dollars upon the execution of this agreement, receipt of which said sum is hereby acknowledged by York.

(b) Twenty-five Thousand ($25,000.00) Dollars upon the day following the date of the release of any motion picture made pursuant hereto, if said motion picture is released at a date earlier than eighteen (18) months from the date of the signing of this agreement. If said motion picture is not released on or before eighteen (18) months from the date of this agreement, then said sum mentioned in this sub-section (b) of Paragraph VII of this agreement, shall be due and payable eighteen (18) months from the date hereof, provided, however, that should said sum not then be so paid, this agreement and all rights of Lasky hereunder shall cease and terminate (except such as shall theretofore have been fully exercised) and Lasky shall be relieved of all further liability to York hereunder.

(c) In addition to the foregoing, Lasky agrees to pay to York a sum equal to four percent. (4%) of the amount by which the gross receipts from the distribution of each motion picture as may be made hereunder shall exceed three million dollars; an amount equal to five per cent. (5%) of the amount by which the gross receipts from the distribution of each motion picture as may be made hereunder shall exceed four million dollars; a sum equal to six per cent. (6%) of the amount by which the gross

Exhibit 1-A—(Continued)

receipts from the distribution of each motion picture as may be made hereunder shall exceed six million dollars and eight per cent. (8%) of the amount by which the gross receipts from the distribution of each motion picture as may be made hereunder shall exceed nine million dollars.

The term "gross receipts from the distribution of such motion pictures as may be made hereunder" as used herein is defined to mean the following:

(a) All monies actually received from said motion picture by Lasky from distribution in the United States of America and its territorial possessions and all other territories of the world in which distribution of said motion picture is made directly to exhibitors.

(b) All monies actually received by Lasky from or on account of the disposition of distributor or exhibition rights in said motion picture in territories other than those described in subdivision (a) above whether such disposition shall have been for a fixed sum or on a percentage basis, or both.

(c) All net monies actually received by Lasky from or on account of the disposition or use of television rights other than in connection with the advertising or exploitation of said motion picture or in connection with 16 MM rights or other similar rights.

Security deposits shall not be included as part of the gross receipts unless and until the same shall be forfeited and applied to said motion picture. The price charged for positive prints as such shall not

Exhibit 1-A—(Continued)

be included as part of the gross receipts, excepting however that any profit from the sale of positive prints shall be included in the gross receipts after all costs of the prints themselves and shipping, transporting and insuring the same have been deducted from the price paid by the sub-distributor.

Commencing with the end of Lasky's regular accounting period following the eighth week after the release in the United States of America of each motion picture made hereunder, and thereafter at reasonable periods in accordance with Lasky's usual accounting periods, Lasky shall deliver to York a statement of the gross receipts and proceeds derived by Lasky from such motion picture during the period immediately preceding such accounting period. Each such report shall include the gross receipts and proceeds derived by Lasky from such motion picture in the United States of America during the period covered by such report and the gross receipts and proceeds of such motion picture from foreign countries reported to Lasky during such period shall also include deductions from gross receipts reported to Lasky for period covered by such report.

Such reports may but need not be made more often than semi-annually but must be made for so long a period as collections are made by Lasky for such motion picture. York shall be entitled to receive statements only for the period collections are made for said motion picture.

Each of said statements shall be accompanied by

Exhibit 1-A—(Continued)

the payment of any sum payable to York as shown by such statement.

All sums received by Lasky from the distribution of said motion picture in foreign countries where the contracts of exhibition or distribution thereof are made in foreign currency, shall be accounted for at the end of the week in which they are earned at the published rate of exchange prevailing in such countries at the end of such week except in cases where the laws or currency regulations of such countries prevent the withdrawal of the same therefrom. In cases of countries whose laws or currency regulations prohibit or prevent the withdrawal of monies therefrom, Lasky shall deposit to York's credit in such bank or banks as may be approved by York in such country or countries, all monies accruing to York from the distribution of said motion picture in such country or countries. Lasky will report the sums so deposited to York at the time of the making of the report of receipts hereinbefore provided for and such deposits shall constitute due remittance of the sums due to York hereunder in respect of the distribution of said motion picture in such country or countries. All accountings by Lasky of monies derived from countries whose laws or currency regulations prohibit or prevent the withdrawal of monies therefrom shall be made in the currency of such country or countries.

It is understood and agreed that in the event Lasky's rights hereunder are assigned to a production and/or distributing corporation, such corpora-

Exhibit 1-A—(Continued)

tion must expressly assume the obligation imposed upon Lasky by the terms of this Paragraph VII, and that thereafter wherever the name Lasky is used in this paragraph of this agreement the name of such assignee shall be deemed substituted in its place instead.

VIII. The rights granted in Paragraph II hereof shall include, but not be limited to, the sole and exclusive publication, novelization and serialization rights in and to any and all shorts stories, serials, and/or novels taken from or based upon any and all stories, screenplays, films and photoplays made, written and/or produced containing one or more incidents in, of or from the life of York.

IV. Lasky agrees that whenever he requests the services of York at any place other than Pall Mall or Nashville, Tennessee or their environs, he will furnish round trip, first class transportation to York from Nashville, Tennessee, to and from the place where such services are requested to be rendered. Such transportation shall include first class Pullman accommodations when available. Whenever under the provision of this Paragraph Lasky is obliged to furnish transportation for York he will furnish like transportation and accommodation for one other person upon York's request therefor.

Whenever the services of York are requested by Lasky to be performed any place other than Pall Mall, Tennessee, or its environs, Lasky agrees to pay the reasonable and necessary living expenses of

Exhibit 1-A—(Continued)

York during the time such services are so rendered.

X. York hereby waives any claim which he personally can, may or shall have by reason of the use by Lasky of the titles of any of the works set forth in sub-paragraphs (a), (b) and (c) in Paragraph I of this agreement.

XI. York hereby grants to Lasky during the term hereof, the sole and exclusive right to make use of and have absolute control of York's name, or his professional name, for advertising, commercial and publicity purposes, and York shall at no time during the said term grant the right to, authorize or permit any person, firm, or corporation other than Lasky to make use of his name for advertising, commercial or publicity purposes. Nothing herein contained, however, shall confer upon Lasky the right to use York's name or likeness or permit the use thereof in connection with the endorsement of any product without York's written consent first having been obtained.

XII. It is distinctly understood and agreed by and between the parties hereto that the services to be rendered by York under the terms hereof, and the rights and privileges granted to Lasky by York under the terms hereof, are of a special, unique, extraordinary and intellectual character, which gives them a peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in any action at law, and that a breach by York of any of the provisions contained in this agreement

Exhibit 1-A—(Continued)

will cause Lasky great and irreparable injury and damage. York hereby expressly agrees that Lasky shall be entitled to the remedies of injunction, specific performance and other equitable relief to prevent a breach of this agreement by York. This provision shall not, however, be construed as a waiver of any of the rights which Lasky may have in the premises for damages, or otherwise.

XIII. York hereby appoints Lasky his true and lawful attorney, irrevocably, but for the sole benefit of Lasky, to institute and prosecute such proceedings as Lasky may deem expedient, but at Lasky's sole cost and expense, to protect the rights herein granted and/or purported to be granted and/or to effect the recovery by Lasky of damages and penalties for the infringement of said rights, and/or to secure to Lasky the full benefit of all the rights herein granted and/or purported to be granted. Lasky may sue in his own name and/or may use York's name, and/or at his option, may join York as party plaintiff or defendant in any suit or proceeding brought for such purpose or purposes.

XIV. York hereby guarantees and warrants that he will indemnify, make good and hold harmless Lasky of, from and against any and all loss, damage, costs, charges, legal fees, recoveries, judgments, penalties and expenses which may be obtained against, imposed upon or suffered by Lasky by reason of any infringement or violation or alleged violation of any copyright or any other right of any

Exhibit 1-A—(Continued)

person, firm or corporation, or by reason of or from any use which may be made of rights herein granted by Lasky, or by reason of the breach of any term, covenant, representation, or warranty herein contained, or by reason of anything whatsoever which might prejudice the securing to Lasky of the full benefit of the rights herein granted and/or purported to be granted. The foregoing guarantees and warranties shall not apply to any fictional material not included in the works set forth in Paragraph I hereof, which may be interpolated by Lasky.

XV. Lasky is a resident of the State of California; York is a resident of the State of Tennessee. It is a fact that this contract is executed in the State of Tennessee. It is agreed, however, that the interpretation, construction, and enforcement of this agreement shall be governed by the laws of the State of California, provided, however, that if anything in the applicable California law would impair or invalidate the rights to compensation granted to York by the terms of this agreement, and the applicable provision of the Tennessee law would not impair or invalidate the same, then, and to that extent the Tennessee law shall govern.

In Testimony Whereof, we have set out hands and seals on this the day and year first hereinabove written.

/s/ JESSE L. LASKY

/s/ Sgt. ALVIN C. YORK

Exhibit 1-A—(Continued)

State of Tennessee,
County of Davidson—ss.

Personally appeared before me, Virginia J. Phelps, a Notary Public in and for the State and County aforesaid, the within named Jesse L. Lasky and Sgt. Alvin C. York, the bargainors, with whom I am personally acquainted and who acknowledged before me that they executed the foregoing instrument for the purposes therein contained.

Witness my hand and seal this the 23rd day of March, 1940.

/s/ VIRGINIA J. PHELPS,
Notary Public, Davidson Co., Tenn.

EXHIBIT No. 2

[Petitioner's Exhibit No. 2 admitted in evidence December 10, 1951]

Agreement, made this 15th day of May, 1940, by and between Jesse L. Lasky, hereinafter called the "Seller", and Warner Bros. Pictures, Inc., a Delaware corporation, hereinafter called the "Purchaser",

Witnesseth:

Whereas, under date of March 23, 1940, Seller entered into a contract in writing with Sergeant Alvin C. York, a photostatic copy of which said contract is hereto annexed and marked Exhibit "A";

Now, Therefore, the undersigned, Jesse L. Lasky, hereby warrants:

(a) That he is the sole owner of all rights acquired by him under said contract dated March 23, 1940.

(b) That he has not heretofore conveyed or granted any right, title or interest in or to the said contract or in or to any right, title or interest thereby conveyed and that he has suffered no lien, encumbrance or other cloud to be obtained against such right, title or interest.

(c) That he has heretofore paid said York the sum of Twenty-five Thousand Dollars ($25,000.00), as recited in subdivision (a) of Paragraph VII of the said agreement, and in other respects has fully performed all covenants on his part to be performed under the terms of said agreement to the date of these presents, and that no default exists in said agreement but that same is in full force and effect.

In Consideration of the covenants of the Purchaser herein contained and of the payment of the sums at the times and in the manner hereinafter provided, the Seller does hereby grant and assign to the Purchaser all the right, title and interest of the Seller in, to or under the said agreement of March 23, 1940, (Exhibit "A"), together with any and all rights, licenses and/or privileges acquired by him therein and thereunder.

The Purchaser hereby agrees to keep and perform all the terms, conditions and covenants of said agreement of March 23, 1940, which have been

Exhibit No. 2—(Continued)

agreed to be kept and performed by the Seller herein, in accordance with the agreement heretofore mentioned. In further consideration for the right, title and interest hereby granted, transferred and assigned, the Purchaser agrees to pay to the Seller the sum of Forty Thousand Dollars ($40,000.00) at the following times: (a) Thirty-two Thousand Five Hundred Dollars ($32,500.00) upon the execution of this agreement, receipt of which said sum is hereby acknowledged by Seller; (b) The balance of Seven Thousand Five Hundred Dollars ($7,500.00) upon the receipt by Purchaser of all necessary assignments, quit-claims or other documentary clearances deemed by it necessary to permit the use of the literary material set forth and described in Paragraph I of the said agreement of March 23, 1940, (Exhibit "A"), for the purposes mentioned in said agreement; provided, however, that said balance of Seven Thousand Five Hundred Dollars ($7,500.00) shall be paid to Seller on or before July 15, 1940, whether or not such further assignments, quitclaims or clearances in connection with said literary works are obtained by such time.

In Witness Whereof, the undersigned have executed these presents, the day and year first above written.

/s/ JESSE L. LASKY,
Seller

WARNER BROS. PICTURES, INC.
/s/ By R. J. OBRINGER,
Purchaser

Exhibit No. 2—(Continued)

It is stipulated that the Exhibit "A" referred to in the attached copy of the Agreement dated May 15, 1940, is the same contract as Exhibit 1-A of this Stipulation of Facts; and for that reason it is not reproduced.

EXHIBIT No. 3

[Petitioner's Exhibit No. 3 admitted in evidence December 10, 1951]

SUPPLEMENTAL AGREEMENT

This Agreement, made and entered into this 15th day of May, 1940 by and between Warner Bros. Pictures, Inc., a Delaware corporation, hereinafter referred to as "Warners", and Jesse L. Lasky, hereinafter referred to as "Lasky",

Witnesseth:

Whereas, the parties hereto have simultaneously herewith entered into a contract whereby Warners have purchased all the right, title and interest of Lasky in and under a certain contract between Lasky and Alvin C. York, dated March 23, 1940, relating to a motion picture tentatively entitled, "The Amazing Story of Sergeant York", as in said contract set forth,

Now, Therefore, it is further agreed that as an additional compensation and consideration payable to Lasky by Warners for the rights contained in the aforesaid contract, Warners will pay to Lasky a further sum based upon the gross returns from

Exhibit No. 3—(Continued)

the release and/or distribution and/or exhibition of the said photoplay, as follows:

1. The said photoplay shall be distributed upon such terms as may be satisfactory to Warners by any distributor of its choice, whether or not such distributor be an affiliate or subsidiary of Warners, or whether or not such distributor be wholly or partly owned and/or controlled, directly or indirectly, by Warners. It is further agreed that the said photoplay may be exhibited in theatres owned and/or operated by Warners and/or owned and/or operated by exhibitors partly or wholly owned or controlled by Warners. In this connection, however, Warners agrees that the photoplay contemplated hereunder and so distributed and/or exhibited shall in no case receive substantially different or discriminatory treatment from that generally received by other photoplays produced by Warners and distributed during substantially the same period of time as the photoplay herein contemplated.

2. Warners will pay Lasky a sum equal to twenty per cent (20%) of the gross film rentals or sales (as hereinafter defined) realized from such motion picture in excess of the sums hereinafter stated. The term "gross film rentals or sales", as used herein, shall be deemed to be the aggregate of the domestic proceeds and the foreign proceeds realized from the sale, rental or distribution of the photoplay contemplated hereunder. The domestic proceeds shall be deemed to be the sum total of all moneys realized from the sale, rental or distribution

Exhibit No. 3—(Continued)

of said photoplay in the United States, Alaska and Hawaii, which are received, collected, credited to or held for Warners, its agents, assigns, affiliated or subsidiary companies. The foreign proceeds hereunder shall be deemed to mean only such moneys realized from the sale, rental, or distribution of the said photoplay in territories other than the United States, Alaska, and Hawaii, when such sums shall be actually received by Warners in cash or its equivalent at its New York office. Warners will pay Lasky the said sum of twenty per cent (20%) upon the said domestic proceeds in excess of One Million Six Hundred Thousand Dollars ($1,600,000.00) and a similar percentage of the foreign proceeds in excess of One Hundred and Fifty Thousand Dollars ($150,000.00); provided, however, that if said foreign proceeds shall not amount to One Hundred and Fifty Thousand Dollars ($150,000.00) within six (6) months after the domestic proceeds have reached the sum of One Million Six Hundred Thousand Dollars ($1,600,000.00), then the obligation of Warners to pay Lasky any further sums by way of percentage upon said domestic proceeds shall cease until the aggregate of the domestic proceeds and the foreign proceeds shall reach the sum of One Million Seven Hundred and Fifty Thousand Dollars ($1,750,000.00), upon which Warners will resume the payment to Lasky of a sum equal to twenty per cent (20%) of both domestic and foreign proceeds, as herein set forth. After the aggregate proceeds have reached the sum of One Million Seven Hundred and Fifty Thousand Dollars ($1,750,-

Exhibit No. 3—(Continued)

000.00), as aforesaid, then thereafter the foreign proceeds shall include all moneys realized from the sale, rental, or distribution of the photoplay in such foreign territories which are received, collected, credited to or held for Warners, its agents, assigns, affiliated or subsidiary companies, whether or not such sums shall be actually received by Warners in cash or its equivalent, at its New York office, subject, however, to the provisions of paragraph 4 hereof with respect to the obligation of Warners to account for such proceeds. It is further understood that should the aggregate proceeds, both domestic and foreign, reach the sum of Two Million Five Hundred Thousand Dollars ($2,500,000.00), then thereafter Warners will pay Lasky a sum equal to twenty-five per cent (25%) of the excess above such figure instead of twenty per cent (20%) as is herein provided for proceeds below such figure.

3. It is understood that in certain foreign countries it is now, or may hereafter be, the practice to distribute photoplays in such country or territory on a basis whereby a flat rental, purchase price or license fee is paid which may bear no necessary or direct relation to, and does not constitute any fixed or ascertainable percentage of, the actual receipts from theatres or other exhibitors. In such event, such flat rental, purchase price or license fee shall be deemed to constitute "gross film rentals or sales" within the purview hereof. Anything herein to the contrary notwithstanding, it is understood that there may be deducted from the gross film rentals or sales

Exhibit No. 3—(Continued)

derived from the sale or distribution of the photoplay hereunder in foreign countries an aliquot portion of any "kontingent" or "quota" losses which Warners or its affiliated or subsidiary company or companies suffer or incur in such case for or on account of the right and privilege of distributing or exhibiting foreign made photoplays therein. Such "kontingent" or "quota" losses in any country, with respect to the photoplay contemplated hereunder, shall be determined in the same manner as such loss is determined for such country with respect to any other picture produced by Warners and distributed in such country during substantially the same period as the photoplay hereunder is distributed.

4. All accountings and/or payments to Lasky of his percentage of said gross rentals over One Million Seven Hundred and Fifty Thousand Dollars ($1,750,000.00) and/or Two Million Five Hundred Thousand Dollars ($2,500,000.00) shall be in terms of United States currency at the rate of exchange current at the time of accounting and payment hereunder. With respect to sums from foreign distribution, Warners shall not be accountable for losses due to fluctuation in the rate of exchange which may occur during the interval between successive accountings. Warners agrees in its accountings to advise Lasky concerning any moneys which may have been earned in foreign countries and which it may not have been able to receive at its New York office by reason of the operation of gov-

Exhibit No. 3—(Continued)

ernment laws or regulations of any such foreign country or territory. Warners shall not be required to make payment hereunder with respect to such restricted moneys unless and until it becomes practical to effect the remission of such restricted moneys to New York from such foreign country in a reasonable and economical manner. Lasky, after receiving any such advice of restricted or unavailable moneys, may, if he so desires, elect to take his percentage thereof in credit in his own name in such foreign country, and Warners agrees to make such assignments as may be necessary to accomplish such purpose, to the end that such credit to Lasky be made in his name or for his benefit in the particular country as to which Lasky shall have made such election.

5. Warners agrees to keep at its office in New York City complete books of account pertaining to the distribution of the photoplay herein contemplated, together with all records and contracts pertaining to the same (other than books, records and contracts relating to foreign distribution of said photoplay which may be located in foreign countries), which shall be open during reasonable hours to the inspection of Lasky or his authorized agents.

6. After the first release of the picture hereunder, Warners agrees that it will render periodical accountings to Lasky in statement form not less than once each quarter, the precise time of rendering such account and statement to be determined by the regular accounting practice of Warners. All

Exhibit No. 3—(Continued)

moneys shown to be due and payable by such statements shall be paid to Lasky simultaneously therewith. It is agreed, however, that after the expiration of five (5) years from and after the first release date of the photoplay in the United States and Canada, no sums thereafter derived or collected from the distribution or exhibition of said photoplay shall be included in the total gross film rentals or sales hereunder, and, except for sums which may have previously accrued before the expiration of such five (5) year period, there shall be no further obligation on Warners whatsoever hereunder.

7. The proceeds, both domestic and foreign, as contemplated hereunder, including the determination and allocation of quota and exchange losses and other such items, without limitation by reason of specific mention herein, shall be determined by Price, Waterhouse & Co., in accordance with the customary practice of said Price, Waterhouse & Co., in dealing with the general records, accounts and audits of Warners.

8. All rights of Lasky hereunder may be freely assigned by him. This contract shall inure to the benefit of and shall be binding upon Lasky's heirs, executors, administrators and assigns.

In Witness Whereof the undersigned have executed these presents as of the day and year first above written.

WARNER BROS. PICTURES, INC.

/s/ By R. J. OBRINGER

/s/ JESSE L. LASKY

EXHIBIT No. 4

[Petitioner's Exhibit No. 4 admitted in evidence December 10, 1951]

[Letterhead of Warner Bros. Pictures, Inc.]

Mr. Jesse L. Lasky Dec. 30, 1941
Warner Bros. Pictures, Inc.
Warner Bros. Studio, Burbank, California.

Dear Mr. Lasky:

With reference to that certain supplemental agreement between us dated May 15, 1940, providing for the payment by this company to you of certain moneys based upon the gross returns from the release and/or distribution and/or exhibition of the motion picture "Sergeant York", and referring particularly to the provisions of paragraph 2 of said agreement, this will confirm the following understanding and agreement between us with respect thereto:

In paragraph 2 of said agreement, it is provided, among other things, that we shall pay you a sum equal to twenty per cent (20%) of the gross domestic film rentals or sales (as in said agreement defined) realized from the aforesaid picture in excess of the sum of $1,600,000, and a similar percentage upon the foreign proceeds in excess of the sum of $150,000; and a sum equal to twenty-five per cent (25%) of the gross film rentals or sales realized from said picture upon the aggregate proceeds, both domestic and foreign, in excess of the sum of $2,500,000.

We have heretofore accounted to you and paid

Exhibit No. 4—(Continued)

you the sum of $21,216.80, representing your aforesaid twenty per cent (20%) share of the gross film rentals or sales received by us from the domestic proceeds from said photoplay in excess of the aforesaid sum of $1,600,000. You have requested, however, that we at this time also pay you the sum of $85,000, which sum is being paid to you herewith and evidenced by our check No. 75982 for said amount payable to your order.

In consideration of our making the aforesaid payment to you at this time, it is hereby agreed as follows:

(a) That said sum of $85,000 herewith paid to you, and receipt of which is hereby acknowledged by you, is received in full settlement of all your present or anticipated claims to payment based upon and measured by the domestic gross as in paragraph 2 of the said supplemental agreement now provided, as to any of the aggregate domestic proceeds in excess of the sum of $1,600,000, but below the sum of $2,100,000, and said paragraph 2 shall be and is hereby deemed modified to provide that in lieu of the provisions thereof with respect to any payments to you in amounts equal to twenty per cent (20%) of the proceeds in excess of said $1,600,000, but below the sum of $2,500,000, we agree to pay you a sum equal to twenty per cent (20%) of such domestic proceeds in excess of the aggregate amount of $2,100,000, until such proceeds reach the sum of $2,500,000. No change is hereby intended with respect to payments to you measured by proceeds in

Exhibit No. 4—(Continued)

excess of such $2,500,000, but in view of the payment herewith made, no further sums from such domestic proceeds shall become due to you until said domestic proceeds exceed said sum of $2,100,000. Nothing herein contained shall affect the percentage you are entitled to receive upon the foreign proceeds of said picture in excess of the sum of $150,000.00.

(b) That the aforesaid sum of $21,216.80 heretofore paid you shall be deemed payment in advance to you against the sums agreed to be paid to you and equal to twenty per cent (20%) of the domestic proceeds of said photoplay in excess of the sum of $2,100,000, and we shall be under no obligation whatsoever to pay you any further sums whatsoever under any provision of said supplemental agreement in connection with the domestic proceeds from said photoplay until twenty per cent (20%) of such domestic proceeds in excess of said sum of $2,100,000 exceed the aforesaid sum of $21,216.80. In the event such domestic proceeds do not, within a period of three years from the date hereof, reach a total above $2,100,000, which would entitle you to the full sum of $21,216.80, then at such time you agree to refund to us any portion of the last named sum not then earned or accruing to you under the provisions of our contract with you, that is to say, you will refund the amount that $21,216.80 exceeds twenty per cent (20%) of the actual aggregate proceeds in excess of the sum of $2,100,000.00.

Except as above specifically set forth, said supplemental agreement of May 15, 1940, shall not be

Exhibit No. 4—(Continued)

deemed otherwise changed, altered, modified, or affected in any manner or particular.

If the foregoing is in accordance with your understanding, kindly indicate your acceptance and approval thereof by your signature in the space hereinbelow provided.

Very truly yours,

WARNER BROS. PICTURES, INC.

/s/ By R. J. OBRINGER,
Assistant Secretary

Approved and Accepted:
/s/ JESSE L. LASKY

EXHIBIT No. 5

[Petitioner's Exhibit No. 5 admitted in evidence December 10, 1951]

[Letterhead of Warner Bros. Pictures, Inc.]

Mr. Jesse L. Lasky, Dec. 31, 1941
c/o Warner Bros. Pictures, Inc.
Burbank, California.

Dear Mr. Lasky:

With reference to that certain supplemental agreement between us, dated May 15, 1940, providing for the payment by this Company to you of certain sums based upon the gross returns from the release and/or distribution and/or exhibition of the motion picture, "Sergeant York", all as amended by

Exhibit No. 5—(Continued)

a letter agreement between us modifying certain provisions of said supplemental agreement, and which letter agreement was dated December 30, 1941, this will confirm the following further understanding and agreement between us with respect thereto:

Under said letter agreement of December 30, 1941, we have paid to you the sum of Eighty Five Thousand Dollars ($85,000.00), as in said agreement recited. You have requested, however, that we pay to you the further sum of Ninety Thousand Dollars ($90,000.00), which further sum is being paid to you herewith and evidenced by our check No. 76004 for said amount payable to your order, and in consideration of our making such further payment to you at this time, it is agreed:

(a) That said sum of Ninety Thousand Dollars ($90,000.00) herewith paid to you, receipt of which is hereby acknowledged by you, together with the sum of Eighty-Five Thousand Dollars ($85,000.00) above mentioned and received by you under the provisions of said amendment dated December 30, 1941, is received in full settlement of all your present or anticipated claims to payment based upon and measured by the domestic gross, as in paragraph 2 of the said supplemental agreement of May 15, 1940, now provided, as to any of the aggregate domestic proceeds in excess of the sum of $1,600,000 but below the sum of $2,580,000, and said paragraph 2 of the said supplemental agreement and paragraph (a) of the said letter agreement are

Exhibit No. 5—(Continued)

hereby deemed modified accordingly to provide that the aforesaid aggregate cash payment of One Hundred and Seventy-five Thousand Dollars ($175,000.00) shall replace any obligation on our part thereunder with respect to any payments to you equal to any specified percentage of such domestic proceeds below said sum of $2,580,000, and no further sums from such domestic proceeds shall become due to you until said domestic proceeds exceed said sum of $2,580,000. No change is hereby intended with respect to the rate of payment to you upon proceeds in excess of the sum of $2,500,000, that is to say, such rate shall remain at twenty-five per cent (25%). It is further agreed that nothing herein contained shall affect any percentage you are entitled to receive upon the foreign proceeds of said picture in excess of the sum of $150,000.00.

(b) That the sum of $21,216.80 mentioned and provided for in the said letter agreement of December 30, 1941, and in lieu of the provisions of paragraph (b) of said letter agreement, shall be deemed payment in advance to you against the sums agreed to be paid to you and equal to twenty-five per cent (25%) of the domestic proceeds of said photoplay in excess of the sum of $2,580,000, and we shall be under no obligation whatsoever to pay you any further sums under any provision of said supplemental agreement or said letter agreement in connection with the domestic proceeds from said photoplay until twenty-five per cent (25%) of such domestic proceeds in excess of said sum of $2,580,-

Exhibit No. 5—(Continued)

000 exceeds the aforesaid sum of $21,216.80. In the event such domestic proceeds do not within a period of three (3) years from the date hereof reach a total above $2,580,000, which would entitle you to the full sum of $21,216.80, then at such time you agree to refund to us any portion of the last named sum not then earned or accruing to you under the provisions of our contract with you as heretofore or hereby amended; that is to say, you will refund the amount that $21,216.80 exceeds twenty-five per cent (25%) of the actual aggregate proceeds in excess of the sum of $2,580,000.

Except as above specifically set forth, said supplemental agreement of May 15, 1940, and said letter agreement of December 30, 1941, shall not be deemed otherwise changed, altered, modified or affected in any manner or particular.

If the foregoing is in accordance with your understanding, kindly indicate your acceptance and approval thereof by your signature in the space hereinbelow provided.

Very truly yours,

WARNER BROS. PICTURES, INC.

/s/ By R. J. OBRINGER,
Assistant Secretary

Approved and Accepted:

/s/ JESSE L. LASKY

Initialed "L.W."

EXHIBIT No. 6

[Petitioner's Exhibit No. 6 admitted in evidence December 10, 1951]

[Letterhead of Warner Bros. Pictures, Inc.]

Mr. Jesse L. Lasky April 30, 1942
c/o Warner Bros. Pictures, Inc.
Burbank, California

Dear Mr. Lasky:

With reference to that certain supplemental agreement between us, dated May 15, 1940, as amended, providing for the payment by this Company to you of certain sums based upon the gross returns from the release and/or distribution and/or exhibition of the motion picture "Sergeant York", this will confirm the following further understanding of the agreement between us with respect thereto.

At the present time our Publicity Department intends to conduct a campaign for the purpose of advertising and exploiting the aforesaid picture, "Sergeant York", the cost of said campaign being budgeted in the sum of $75,992.

In consideration of circumstances known to each of us and our mutual consent thereto and in further consideration of the benefits which may accrue to you under said supplemental agreement of May 15, 1940, arising out of increased gross returns from said picture by the stimulus of such advertising campaign, you hereby agree to share and pay a sum equal to 25% of the aforesaid budgeted cost of

Exhibit No. 6—(Continued)

said campaign, to wit, the sum of $18,998.00, and you hereby accordingly authorize and instruct us to withhold and keep from any and all sums which may now or hereafter be due or become payable to you under said supplemental agreement of May 15, 1940, until the aforesaid sum of $18,998.00 has been fully recouped by us.

Except hereinabove specifically set forth, said supplemental agreement of May 15th, 1940 as amended, shall not be otherwise changed, modified, altered or affected in any manner or particular whatsoever.

Kindly indicate your acceptance and approval thereof with your signature in the space hereinbelow provided.

Very truly yours,

WARNER BROS. PICTURES, INC.

/s/ By C. H. WILDER,
Asst. Treasurer.

Approved and Accepted:
/s/ JESSE L. LASKY

EXHIBIT No. 7-B

[Joint Exhibit No. 7-B admitted in evidence December 10, 1951]

CONTRACT OF SALE

Jesse L. Lasky, of Los Angeles, California, hereinafter called "the Seller", is desirous of selling, granting and transferring certain property, and United Artists Corporation, a Delaware corpora-

Exhibit No. 7-B—(Continued)

tion, hereinafter called "the Purchaser" is desirous of acquiring such property.

In order to effectuate the sale and transfer of said property, the Seller and Purchaser agree as follows:

1. Seller warrants that he has entered into the following contracts; that such contracts are valid and subsisting; that he is the owner of the rights and property therein specified as belonging to him and that by virtue thereof he is the owner of certain properties and rights in and to the motion picture entitled "Sergeant York":

(a) Original contract dated May 15th, 1940, between Warner Bros. Pictures, Inc. and Jesse L. Lasky,

(b) Supplemental agreement dated May 15th, 1940 between Warner Bros. Pictures, Inc. and Jesse L. Lasky.

Purchaser acknowledges that Seller has delivered to its copies of said agreements.

2. Seller warrants that he has not heretofore sold, granted or transferred any of the aforesaid contract rights or any interest therein, nor has he suffered any lien, encumbrance, or other cloud to be obtained or to arise against said contract rights or property.

3. Seller hereby grants, sells, transfers, assigns and sets over unto the Purchaser all rights and property of every kind whatsoever which were granted to him in the contracts specified in paragraph 1 or in any other contract or which he may have derived or which he may own from any other

Exhibit No. 7-B—(Continued)

source in the motion picture "Sergeant York", the story or stories thereof, or on which it was based, the proceeds thereof, rights of accounting thereof, money due or to become due therefor from Warner Bros. Pictures, Inc., its subsidiary and affiliated companies and all rights of every kind whatsoever which he obtained pursuant to such contracts and any agreement supplementary, amendatory or collateral thereto or which he may have obtained in any other way and all of his right, title and interest in and to the motion picture "Sergeant York", in and to the story thereof, in and to any scenarios on which it was based or written in connection with the production of the motion picture, in and to all negative and positive prints thereof, in and to any production footage not used in the final release, in and to any contracts he may have any interest in or in connection with the production, distribution and exhibition of the picture "Sergeant York", in and to any contract and any right thereunder or claims thereunder he may have had with Warner Bros. Pictures, Inc. or any subsidiary corporation, in and to any sound licenses, music licenses or any other licenses he may have any interest in, pertaining to or relating to the production, distribution or exhibition of the motion picture "Sergeant York", in and to any rights that may have been granted to him by the living Sergeant York, either orally or in writing, and all rights he may have in and to the published book entitled "The Life of Sergeant York", any and all interest he may have in any

Exhibit No. 7-B—(Continued)

contract with any director, star, player, cameraman or other person in whatever capacity connected with or associated with the production of the motion picture "Sergeant York" any and all right, title and interest he may have had in or by virtue of the original contract dated May 15th, 1940, between Jesse L. Lasky and Warner Bros. Pictures, Inc., the agreement supplemental thereto of similar date and any and all other amendments and supplements thereto including specifically the right to all moneys that are now due or which may become due to Jesse L. Lasky from Warner Bros. Pictures, Inc. thereunder and all rights in and to any property which is the subject matter of such contracts including all his right, title and interest in and to any negative or positives of the motion picture "Sergeant York" and in and to all uses, present and future, that he may have of the stories, the negatives, the positive prints and all rights of every kind and character, in and to any rights he may have to the use of the title "Sergeant York", in and to any and all re-issue or re-make rights he may have in the picture "Sergeant York" or the subject matter thereof, in and to any rights he may have in the distribution or exhibition of "Sergeant York" with substandard width film and any and all rights or interest or property he may have of any kind or character in the motion picture "Sergeant York" or any of the properties used in the production thereof and any of the rights connected with the production, distribution or exhibition thereof, and any and all claims, manner of

Exhibit No. 7-B—(Continued)

action and actions, cause and causes of action, suits, sums of money, accounts, damages, and demands of any kind and character he may have against Warner Bros. Pictures, Inc. or which arise out of or in connection with the motion picture "Sergeant York" against Warner Bros. Pictures, Inc.

4. Seller also authorizes and grants unto the Purchaser irrevocably in his name or otherwise to make such disposition of the rights and properties, transfer and assign herein as it may wish and to execute any document of any kind or character in connection therewith it may desire and to remise, release and discharge for himself and his successors all manner of action and actions, cause and causes of action, suits, duties, dues, sums of money, accounts, reckoning, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands whatsoever in law or in equity which against Warner Bros. Pictures, Inc. or any other person, firm or corporation the said Seller ever had, now has or which it or its successors hereafter can, shall or may have for, upon or by reason of any matter, cause or whatsoever from the beginning of the world to the day and date of this agreement relating to or in connection with the motion picture "Sergeant York" and agrees to be bound thereby as though such instruments were executed by himself, and to release and discharge Warner Bros. Pictures, Inc. from rendering any reports and accounts to him, from paying any money to him or in

Exhibit No. 7-B—(Continued)

anywise be responsible for or have any duties to him by virtue of or arising out of the agreements of May 15th, 1940, or any supplements or amendments thereto, and to acknowledge that Seller neither has nor shall it have any rights or interest of any kind whatsoever in and to the motion picture "Sergeant York" and to entitle Warner Bros. Pictures, Inc. to license, sell, dispose of, re-issue, re-make and in every other way treat the motion picture "Sergeant York", the negative, positive prints, stories, scenarios and other properties thereof as its sole and exclusive property without any accounting, payment or restriction of any kind to the Seller.

5. In Consideration of the foregoing, the Purchaser agrees to pay Jesse L. Lasky for the execution and delivery of these presents the sum of Eight Hundred and Five Thousand Dollars ($805,000) in cash.

6. The Seller agrees to execute on Purchaser's demand any further documents which the Purchaser may request in order to effectuate the sale and transfer contemplated by these presents.

Signed, Sealed and Delivered, this 4th day of December, 1942.

JESSE L. LASKY,
By JESSE L. LASKY (Seller)
[Seal] UNITED ARTISTS CORPORATION (Purchaser)
By ARTHUR W. KELLY, Vice Pres.

[Endorsed]: T.C.U.S. Filed December 10, 1951.

[Title of Tax Court and Causes 26396, 26397.]

FINDINGS OF FACT AND OPINION

Promulgated April 8, 1954.

Cash payment in amount of accumulated shares of film rentals held, ordinary income not capital gain.

Harrison Harkins, Esq., Herschel B. Green, Esq., and Loyd Wright, Esq., for the petitioners.

W. Lee McLane, Jr., Esq., for the respondent.

The Commissioner determined deficiencies in income tax for the year 1943, as follows:

Docket No.		Deficiency
26396	Bessie Lasky	$224,722.55
26397	Jesse L. Lasky	224,515.14

The year 1942 is involved because of the provisions of The Current Tax Payment Act of 1943.

The chief question to be decided is whether the sum of $805,000 which the petitioner, Jesse L. Lasky received in 1942 is taxable as ordinary income or capital gain. An alternative question is whether $570,698.62 was received in 1942, or was constructively received.

Findings of Fact

The facts which have been stipulated are found as facts. The stipulation and the annexed exhibits are incorporated herein by this reference.

The petitioners are husband and wife. They resided in Los Angeles, California, during 1942 and 1943. Each filed separate income tax returns on the

cash basis with the collector for the sixth district of California. Their income in 1942 and 1943 was community income.

The petitioner, Jesse L. Lasky, is referred to hereinafter as the petitioner.

The petitioner's occupation has been that of a motion picture producer since 1913, and he has produced many pictures. He has been a producer for various corporations in which he was an officer such as Jesse L. Lasky Star Players Company, Famous Players- Lasky Company, Paramount Famous-Lasky Company, R.K.O., Fox Film Corporation, and Pickford-Lasky Corporation.

Petitioner was the producer of a radio show called "Gateway to Hollywood" from 1938 to the early part of 1940. For three months in the early part of 1940, petitioner was not associated with or engaged in any production, and he was not associated with any corporation.

Prior to March, 1940, Lasky, as an individual, had not purchased any literary property, but as vice-president in charge of production of Paramount, many literary properties passed through his hands. When he was an officer of Jesse L. Lasky Star Players Company, and when he was in charge of production of Famous Players-Lasky Company he became acquainted with the procedures followed by those companies in purchasing plays, stories, and literary properties.

In the early part of 1940, in Jamestown, Tennessee, petitioner negotiated with Alvin York, a hero of World War I, for the purchase of the motion

picture and other rights in the life story of Alvin York. On March 23, 1940, York and Lasky entered into a written agreement which is incorporated herein by this reference. Under the agreement of March 23, 1940, York sold to Lasky, inter alia, the exclusive motion picture rights in the story of Sergeant York, and, in particular, in three published books, "Sergeant York and His People," "Sergeant York, Last of Long Hunters," and "The War Diary of Sergeant York." In consideration for all the rights received, Lasky agreed to pay York $25,000 upon the execution of the agreement, and $25,000 at the expiration of either 18 months from the date of the execution of the agreement, or upon the date following the release of any motion picture made pursuant to the agreement, whichever date was earlier. Failure to pay the second $25,000 would result in termination of the agreement. In addition, Lacky agreed to pay York a sum equal to 4 per cent of gross receipts from the distribution of each motion picture in excess of $3,000,000; 5 per cent, in excess of $4,000,000; 6 per cent, in excess of $6,000,000; and 8 per cent, in excess of $9,000,000. It was expressly provided that if the contract should be assigned to a production or distribution corporation the assignee would assume all of Lasky's obligations. Lasky paid York $25,000 upon the execution of the agreement. He borrowed the funds used to make the payment.

Petitioner, thereafter, flew to Hollywood, California, where he arrived on about March 25, 1940. Lasky shopped around to sell the story for produc-

tion of a motion picture. He had an outline of a story which he gave Sam Goldwyn to read. He called on Paramount, also. None of the first contacts wanted the story. He then called on Harry and Jack Warner of Warner Bros. Pictures, Inc., hereinafter referred to as Warner Bros. Warner Bros. agreed to purchase the rights to the story of Sergeant York and to employ Lasky as the supervising producer. The understanding of Warner Bros. and Lasky was reached a few weeks before written instruments were ready for execution. The agreements executed and the dates thereof were as follows: (1) One agreement was dated May 8, 1940, by which Warner Bros. employed Lasky as the supervising producer of a photoplay tentatively entitled "The Amazing Story of Sergeant York." (2) Another agreement was dated May 15, 1940, by which Lasky sold to Warner Bros. all of his rights to the York story and all other rights he had acquired under the York contract of March 23, 1940. Another agreement was simultaneously executed, entitled "Supplemental Agreement," which was dated May 15, 1940, by which Warner Bros. agreed to pay Lasky part of the gross receipts, in varying percentages, from the distribution of the photoplay, "The Amazing Story of Sergeant York." These agreements are incorporated herein by this reference.

The agreement of May 8, 1940 was for an original term of 52 weeks beginning, retroactively, on April 1, 1940, with options to extend the period of the agreement for a maximum period of seven years. The agreement provided, inter alia, as follows:

13. It is understood that the Company has purchased from the Producer, all Producer's rights to, in and under certain agreement dated March 23, 1940, between the Producer and Alvin C. York, the original of which contract has been delivered to the Company, and which rights are of value in connection with the production of the proposed photoplay, "The Amazing Story of Sergeant York", referred to in Paragraph 3 hereof. The Company shall be entitled to the services of Producer in the preparation and/or writing of the script upon which said motion picture photoplay shall be based, but it is not a condition or prerequisite to the production of said photoplay that said script shall be approved by Producer, and on the contrary Producer agrees to render his services in the complete production of said photoplay provided only said script meets with the approval of the Company. It is further understood that Producer shall work under the direct supervision of Jack L. Warner and Hal B. Wallis, or either of them, provided either of them remain in the employ of the Company during the term hereof; * * *.

14. It is further agreed that Producer shall be accorded credit on the film of the photoplay produced hereunder and in all paid advertising and publicity issued by and under the direct control of the Company in approximately the following form, to-wit: "Produced by Jesse L. Lasky and Hal B. Wallis."

In general, the aforesaid agreement provided that Lasky would render services as the supervising pro-

ducer of the York photoplay, and such other photoplay as might be selected by mutual consent, for a period of 52 weeks from April 1, 1940; that Lasky, at the option of Warner Bros., would render additional services in connection with the preparation or writing of the script, and editing, supervising, and overseeing the development of the screen play; and that Lasky would receive for all of his services under the contract at least $60,000 payable at the rate of $1,500 per week.

Under the agreements of May 15, 1940, Warner Bros., in general, agreed to pay Lasky $40,000 for all of his right, title, and interest in the York agreement of March 23, 1940, plus a part of the gross receipts from domestic and foreign distribution during not more than five years after the date of release of the York photoplay. Warner Bros. assumed all of Lasky's obligations under the York contract. The so-called "Supplemental Agreement" provided, in part, as follows:

Whereas, the parties hereto have simultaneously herewith entered into a contract whereby Warners have purchased all the right, title and interest of Lasky in and under a certain contract between Lasky and Alvin C. York, dated March 23, 1940, relating to a motion picture tentatively entitled, "The Amazing Story of Sergeant York", as in said contract set forth,

Now, therefore, it is further agreed that as an additional compensation and consideration payable to Lasky by Warners for the rights contained in the aforesaid contract Warners will pay to Lasky

a further sum based upon the gross returns from the release and/or distribution and/or exhibition of the said photoplay, as follows:

* * * * *

2. Warners will pay Lasky a sum equal to twenty per cent (20%) of the gross film rentals or sales (as hereinafter defined) realized from such motion picture in excess of the sums hereinafter stated. The term "gross film rentals or sales", as used herein, shall be deemed to be the aggregate of the domestic proceeds and the foreign proceeds realized from the sale, rental or distribution of the photoplay contemplated hereunder. * * * Warners will pay Lasky the said sum of twenty per cent (20%) upon the said domestic proceeds in excess of One Million Six Hundred Thousand Dollars ($1,600,000.00) and a similar percentage of the foreign proceeds in excess of One Hundred and Fifty Thousand Dollars ($150,000.00); * * * It is further understood that should the aggregate proceeds, both domestic and foreign, reach the sum of Two Million Five Hundred Thousand Dollars ($2,500,000.00), then thereafter Warners will pay Lasky a sum equal to twenty-five per cent (25%) of the excess above such figure instead of twenty per cent (20%) as is herein provided for proceeds below such figure.

* * * * *

Warner Bros. agreed, also, to keep complete books of account pertaining to receipts from the distribution of the photoplay, and to make such records available at all times to Lasky or his agents.

Warner Bros. agreed to render periodical statements to Lasky after the release of the picture, not less than once each quarter, accounting for receipts, and to make simultaneous payment to Lasky of his share of the gross receipts shown by each statement.

The so-called "Supplemental Agreement" of May 15, 1940, is the type of agreement which is known as a participation agreement.

Warner Bros. paid $40,000 to Lasky in 1940, as provided in the agreement of May 15, 1940. Warner Bros. reported the payment of $40,000, on Form 1099 of the Treasury Department as a payment for "Sale of Story."

Lasky went on Warner Bros.' payroll as of April 4, 1940. He was paid $58,500 during 1944 for his services as a producer during 39 weeks. Warner Bros. reported payment of $58,500 as "salary" on Form 1099.

Lasky reported the sums of $40,000 and $58,500 as ordinary income in his income tax return for 1940.

A photoplay entitled, "Sergeant York," was produced; it was released in the United States and Canada in July, 1941.

Lasky's employment as a producer of the photoplay extended over 58½ weeks, from April 4, 1940 to May 17, 1941. Lasky was paid $87,750 for his services at the rate of $1,500 per week.

Lasky was employed by Warner Bros. in the production of other pictures during 1941, 1942, 1943, and 1944. He went back on the payroll on May 19, 1941 in connection with a photoplay about

Mark Twain. He worked on that project intermittently until January 9, 1943, for a period of 77 weeks, receiving total compensation of $126,175, for his services as an associate producer. From January 11, 1943 until April 24, 1944, Lasky worked for Warner Bros. during 83 weeks on "various" projects receiving $150,516.67 for his services as an associate producer.

Warner Bros. followed the practice of mailing statements to Lasky which were designated, "Statement to Jesse L. Lasky covering distribution of production 'Sergeant York' to (date)," together with a check for the amount of Lasky's participating share as shown by the statement. Lasky's share was 20 per cent, at first, under the agreement. The first of such statements was mailed to Lasky with a letter dated December 15, 1941. The statement was for the period ending November 29, 1941, and showed the following:

Gross income from distribution within U.S.	$ 1,706,084.02
Less—gross rentals (U.S.) in which participant does not share	1,600,000.00
Net on which participate shares	$ 106,084.02
Participant's share—20%	$ 21,216.80

Lasky received a check for $21,216.80 with this statement.

An account was set up on the books of Warner Bros. entitled "Income from Distribution of Pro-

duction 'Sergeant York' and Jesse L. Lasky's Share Thereof." This account showed gross receipts from domestic and foreign distribution. The account was periodically credited with Lasky's share of gross receipts pusuant to the "Supplemental Agreement" of May 15, 1940. The account showed the total amount of credits before a new crediting of his share, the amount of his participating share as of a particular date, and the total "to date." It also showed certain charges against Lasky's account. A record was kept of the checks of Warner Bros. which were made payable to Lasky, and the amounts thereof.

At the end of 1941, Lasky made two separate requests to Warner Bros. to make advances to him of his 20 per cent share of gross receipts. His first request was for an advance payment of $85,000, and his second request was for an advance payment of $90,000, a total amount of $175,000. Warner Bros. made the payments requested by check.

In 1941, Lasky received $196,216.80 from the gross receipts from the distribution of the York picture which he reported in his return for 1941 as ordinary income ($21,216.80, plus $175,000).

As consideration for the two advance payments in 1941 of $175,000, Lasky agreed to modifications of the "Supplemental Agreement" of May 15, 1940. The amendments were made by letters of Warner Bros. to Lasky, which he signed as "Accepted," dated December 30, 1941 and December 31, 1941. These "letter agreements" are incorporated herein by this reference.

The letter agreement of December 30, 1941 is set forth in part in the margin.[1]

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[1] The letter agreement of December 30, 1941 provided in part as follows:

* * * * *

In consideration of our making the aforesaid payment [$85,000] to you at this time, it is hereby agreed as follows:

(a) That said sum of $85,000 herewith paid to you, and receipt of which is hereby acknowledged by you, is received in full settlement of all your present or anticipated claims to payment based upon and measured by the domestic gross as in paragraph 2 of the said supplemental agreement now provided, as to any of the aggregate domestic proceeds in excess of the sum of $1,600,000, but below the sum of $2,100,000, and said paragraph 2 shall be and is hereby deemed modified to provide that in lieu of the provisions thereof with respect to any payments to you in amounts equal to twenty per cent (20%) of the proceeds in excess of said $1,600,000, but below the sum of $2,500,000, we agree to pay you a sum equal to twenty per cent (20%) of such domestic proceeds in excess of the aggregate amount of $2,100,000, until such proceeds reach the sum of $2,500,000. No change is hereby intended with respect to payments to you measured by proceeds in excess of such $2,500,000, but in view of the payment herewith made, no further sums from such domestic proceeds shall become due to you until said domestic proceeds exceed said sum of $2,100,000. Nothing herein contained shall affect the percentage you are entitled to receive upon the foreign proceeds of said picture in excess of the sum of $150,000.00.

(b) That the aforesaid sum of $21,216.80 heretofore paid you shall be deemed payment in advance to you against the sums agreed to be paid to you and equal to twenty per cent (20%) of the domestic proceeds of said photoplay in excess of the sum of

The letter agreement of December 31, 1941 is set forth in part in the margin.[2]

$2,100,000, and we shall be under no obligation whatsoever to pay you any further sums whatsoever under any provision of said supplemental agreement in connection with the domestic proceeds from said photoplay until twenty per cent (20%) of such domestic proceeds in excess of said sum of $2,100,000 exceed the aforesaid sum of $21,216.80. In the event such domestic proceeds do not, within a period of three years from the date hereof, reach a total above $2,100,000, which would entitle you to the full sum of $21,216.80, then at such time you agree to refund to us any portion of the last named sum not then earned or accruing to you under the provisions of our contract with you, that is to say, you will refund the amount that $21,216.80 exceeds twenty per cent (20%) of the actual aggregate proceeds in excess of the sum of $2,100,000.00.

Except as above specifically set forth, said supplemental agreement of May 15, 1940, shall not be deemed otherwise changed, altered, modified, or affected in any manner or particular.

* * * * *

[2] The letter agreement of December 31, 1941, provided in part as follows:

* * * * *

Under said letter agreement of December 30, 1941, we have paid to you the sum of Eighty Five Thousand Dollars ($85,000.00), as in said agreement recited. You have requested, however, that we pay to you the further sum of Ninety Thousand Dollars ($90,000.00), which further sum is being paid to you herewith and evidenced by our check No. 76004 for said amount payable to your order, and in consideration of our making such further payment to you at this time, it is agreed:

(a) That said sum of Ninety Thousand Dollars ($90,000.00) herewith paid to you, receipt of which is hereby acknowledged by you, together with the

As consideration for the advance payments of $175,000, Lasky agreed that he would begin to share in the earnings of "Sergeant York" after the gross film rentals reached $2,580,000 instead of $1,600,000, as previously agreed. If Lasky had waited to receive the twenty per cent first agreed upon, his share would have been $196,000. Therefore, the receipt of the advance payments of $175,000 repre-

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sum of Eighty-Five Thousand Dollars ($85,000.00) above mentioned and received by you under the provisions of said amendment dated December 30, 1941, is received in full settlement of all your present or anticipated claims to payment based upon and measured by the domestic gross, as in paragraph 2 of the said supplemental agreement of May 15, 1940, now provided, as to any of the aggregate domestic proceeds in excess of the sum of $1,600,000 but below the sum of $2,580,000, and said paragraph 2 of the said supplemental agreement and paragraph (a) of the said letter agreement are hereby deemed modified accordingly to provide that the aforesaid aggregate cash payment of One Hundred and Seventy-five Thousand dollars ($175,000.00) shall replace any obligation on our part thereunder with respect to any payments to you equal to any specified percentage of such domestic proceeds below said sum of $2,580,000, and no further sums from such domestic proceeds shall become due to you until said domestic proceeds exceed said sum of $2,580.000. No change is hereby intended with respect to the rate of payment to you upon proceeds in excess of the sum of $2,500,000, that is to say, such rate shall remain at twenty-five per cent (25%). It is further agreed that nothing herein contained shall affect any percentage you are entitled to receive upon the foreign proceeds of said picture in excess of the sum of $150,000.00.

(b) That the sum of $21,216.80 mentioned and provided for in the said letter agreement of Dece r-

sented a discount of the first $196,000 of earnings for $21,000. Lasky gave Warner Bros. a discount in order to receive payments in 1941 in advance.

By another "letter agreement" dated April 30, 1942, Lasky agreed to pay (and he authorized Warner Bros. to withhold and keep from any sums due him under the Supplemental Agreement of May 15, 1940, as amended) the sum of $18,998.00 to

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ber 30, 1941, and in lieu of the provisions of paragraph (b) of said letter agreement, shall be deemed payment in advance to you against the sums agreed to be paid to you and equal to twenty-five per cent (25%) of the domestic proceeds of said photoplay in excess of the sum of $2,580,000, and we shall be under no obligation whatsoever to pay you any further sums under any provision of said supplemental agreement or said letter agreement in connection with the domestic proceeds from said photoplay until twenty-five per cent (25%) of such domestic proceeds in excess of said sum of $2,580,000 exceeds the aforesaid sum of $21,216.80. In the event such domestic proceeds do not within a period of three (3) years from the date hereof reach a total above $2,580,000, which would entitled you to the full sum of $21,216.80, then at such time you agree to refund to us any portion of the last named sum not then earned or accruing to you under the provisions of our contract with you as heretofore or hereby amended; that is to say, you will refund the amount that $21,216.80 exceeds twenty-five per cent (25%) of the actual aggregate proceeds in excess of the sum of $2,580,000.

Except as above specifically set forth, said supplemental agreement of May 15, 1940, and said letter agreement of December 30, 1941, shall not be deemed otherwise changed, altered, modified or affected in any manner or particular.

* * * * *

be expended by Warner Bros. in an advertising campaign of the picture, "Sergeant York." This sum was withheld by Warner Bros. prior to December 4, 1942.

At some time prior to May 1942, a claim based upon alleged plagiarism was lodged against Warner Bros. and Lasky by the heirs of Skeyhill, the author of, "Sergeant York, Last of Long Hunters." Warner Bros. tentatively debited petitioner's account on its books in the amount of $10,000 as a safeguard against possible costs arising out of such claim. Of this debit, all but $239.75 was ultimately re-credited to petitioner's account.

On about May 6, 1942, Lasky instructed Warner Bros. to send future statements of account and participation checks, and other matters directly to his attorney.

Lasky consulted and retained a certified public accountant who specialized in motion picture accounting and in the investigation of motion picture distribution and participation accounting. Lasky and his attorney consulted the accountant about Lasky's rights under the "Supplemental Agreement" of May 15, 1940, as amended, with the purpose of securing a proper accounting of proceeds from Warners under the contract.

Under date of May 6, 1942, Warner Bros. mailed to Lasky's attorney in Los Angeles, a statement purporting to show the domestic and foreign receipts from the distribution of "Sergeant York" to February 28, 1942, and Lasky's share thereof, together with its check, made payable to Lasky, in

the amount of $244,529.84. The statement showed, among other things, United States gross feature rentals to February 28, 1942 in the amount of $3,758,978.57, without detailed explanation. The statement listed foreign income to February 28, 1942 as $85,613.15, against which was offset $150,000; the latter was described as "Income on which participant does not share." The statement disclosed that "The sum of $10,000.00 has been withheld at this time by reason of the claim of alleged Skeyhill heirs."

There was attached to the check of Warner Bros. for $244,529.84, a voucher which was a permanent part of the check form. The voucher bore the legend, "Void If Detached." On the voucher was typed the number of the voucher and, "Your share of income from distribution of production 'Sergeant York' per statements rendered as of February 28, 1942, $244,529.84." A letter which accompanied the check described the check as "covering the amount shown by the statement to be due."

Lasky was advised by his attorney not to accept the check for $244,529.84. With the approval of Lasky, his attorney returned the check to Warner Bros. Pictures, Inc., by registered mail on June 3, 1942 with the following statement: "I am unable to accept the check for Mr. Lasky under the conditions as sent ....."

On July 10, 1942, Warner Bros. mailed petitioner's attorney another check made payable to Lasky in the amount of $132,692.08. On October 13, 1942, Warner Bros. mailed petitioner's attorney

another check made payable to Lasky in the amount of $193,476.70. Each check was accompanied by a statement showing the gross rentals of the York photoplay, domestic and foreign, to May 10, 1942, and to August 29, 1942, respectively, and Lasky's share up to each date. A voucher was attached to each check with the legend, "Void If Detached."

Petitioner's attorney returned the checks for $132,692.08, and $193,476.70, to Warner Bros. with letters stating in each instance: "We are unable to accept this check under present conditions, and for that reason I am compelled to return the same."

The three checks which were received by Lasky's attorney in 1942 and which were returned in 1942 totaled $570,698.62. Upon receipt of the returned checks, Warner Bros. stamped them, "Void."

No investigation was ever made on Lasky's behalf by his accountant or agents of Warner Bros.' records of the receipts from the distribution of the York photoplay to determine whether or not Lasky was receiving a fair accounting of his participating share of the receipts, or to determine any other matters.

After the return to Warner Bros. of the three checks totaling $570,698.62, Warner Bros. did not send any more statements or any more checks to Lasky or to his attorney in payment of Lasky's participation in the York picture rentals. However, on its books, Warner Bros. continued to make credits to Lasky's account as it had done previously. Exhibit Z, a copy of the accounting records of Warner Bros. of Lasky's participation in the York

picture receipts is incorporated herein by this reference. It shows that computations of the receipts, foreign and domestic, in which Lasky had a share, were computed as of February 28, 1942, April 4, 1942, May 2, 1942, May 30, 1942, July 4, 1942, October 3, 1942, October 31, 1942, and November 28, 1942. Also, the cumulative totals of Lasky's shares were computed. The cumulative balances of the gross receipts on August 29, 1942, October 3, 1942, October 31, 1942, and November 28, 1942, were as follows:

	Cumulative Total of Credits to Lasky
August 29, 1942	$570,938.37
Oct. 3, 1942	628,978.66
Oct. 31, 1942	679,013.38
Nov. 28, 1942	822,857.56

The aforesaid account on the books of Warner Bros. was closed out on December 22, 1942, by the notation: "Assigned to United Artists Corporation." A check of Warner Bros. for $820,000, dated December 22, 1942, made payable to United Artists Corporation was entered in the account and was charged to the cumulative balance shown therein. Also, $2,857.56 was charged to the account as a charge to "Producer," [Lasky]. The explanation written in the account for the check to United Artists in the amount of $820,000, stated, in part, as follows: "The $820,000 was in full payment of all claims of every nature arising out of the purchase of the stories as well as any share accruing

from distribution of the production [the York photoplay]."

The check for $820,000, payable to United Artists, dated December 22, 1942, bore the following notation: "Payment as per agreement dated December 22, 1942 between Warner Bros. Pictures, Inc., and United Artists Corporation."

The check was paid on December 24, 1942; United Artists received payment of the check for $820,000 on December 24, 1942.

In 1942, Lasky's attorney had a conference with an executive of Warner Bros. about foreign blocked funds, and the executive of Warner Bros. proposed that Lasky's share of foreign blocked funds (presumably foreign receipts from the distribution of the York picture) should be $200,000; but Lasky's attorney did not agree. Lasky's attorney discussed, as some undisclosed time, with executives of Warner Bros. criticisms which he had heard about Warner Bros.' handling of the York picture.

Lasky was advised and he decided to get out of his agreement of May 15, 1940 with Warner Bros. His attorney handled all negotiations. His attorney worked out an agreement with United Artists Corporation whereby it would pay Lasky $805,000. The agreement was consummated on December 4, 1942. United Artists was represented by its attorney. On or about December 4, 1942, Lasky received $805,000 from United Artists.

United Artists, on December 22, 1942, received a check from Warner Bros. for $820,000. The check was paid on December 24, 1942.

Petitioner's attorney had been secretary-treasurer of United Artists Corporation off and on.

The transaction between Lasky and United Artists was covered by an agreement which was entitled "Contract of Sale." It was dated December 4, 1942. Under the agreement Lasky sold and assigned to United Artists all of his interest in the original and supplemental agreements with Warner Bros. dated May 15, 1940, and all of his interest in the motion picture, "Sergeant York," including the proceeds thereof, rights of accounting thereof, money due or to become due thereof from Warner Bros. Pictures, Inc., * * *." Under the agreement, Lasky, also, inter alia, authorized United Artists, the "purchaser," irrevocably and in his [Lasky's] name, or otherwise to do the following:

* * * to execute any document of any kind or character * * * and to remise, release and discharge for himself and his successors, all manner of action and actions, cause and causes of action, suits, duties, dues, sums of money, accounts, * * * claims and demands whatsoever in law or in equity which against Warner Bros. Pictures, Inc., or any other person, firm or corporation, the said Seller [Lasky] ever had, now has * * * or may have * * * relating to or in connection with the motion picture "Sergeant York," and agrees to be bound thereby as though such instruments were executed by himself, and to release and discharge Warner Bros. Pictures, Inc. from rendering any reports and accounts to him [Lasky] from paying any money to him or in anywise be responsible for or have any duties

to him by virtue of or arising out of the agreements of May 15th, 1940, or any supplements or amendments thereto, and to acknowledge that Seller neither has nor shall it have any rights or interest of any kind whatsoever in and to the motion picture "Sergeant York" and to entitle Warner Bros. Pictures, Inc. to license, sell, dispose of, re-issue, re-make and in every other way treat the motion picture "Sergeant York," the negative, positive prints, stories, scenarios and other properties thereof as its sole and exclusive property without any accounting, payment or restriction of any kind to the Seller.

In consideration of all of the assignment and transfer of Lasky, "the Seller," United Artists agreed to pay Lasky, upon execution and delivery of the agreement, the sum of $805,000, in cash.

The agreement of December 4, 1942 (Exhibit 7-B) is incorporated herein by this reference.

On December 22, 1942, United Artists and Warner Bros. Pictures, Inc., executed an agreement entitled, "Contract of Sale" (Exhibit AA), which is incorporated herein by this reference. Under this agreement, United Artists sold and assigned to Warner Bros. for $820,000, the contract of sale dated December 4, 1942, between Lasky and United Artists, which was attached to the contract between United Artists and Warner Bros. United Artists, by its contract, sold and assigned to Warner Bros., all rights of every kind acquired by it under the terms of the agreement of December 4, 1942, (with Lasky), including, inter alia, its rights, as follows:

* * * * *

* * * in and to any contract and any right thereunder or claims thereunder it may have by virtue of contracts or claims thereunder which Jesse L. Lasky may have had with Warner Bros. Pictures, Inc. or any subsidiary corporation, in and to any * * * licenses it may have any interest in pertaining to or relating to the production, distribution or exhibition of the motion picture "Sergeant York," * * * any and all right, title and interest it may have by virtue of the original contract dated May 15th, 1940 between Jesse L. Lasky and Warner Bros. Pictures, Inc., the agreement supplemental thereto of similar date, and any and all other amendments and supplements thereto including specifically the right to all moneys that are now due or which may become due to Jesse L. Lasky from Warner Bros. Pictures, Inc., thereunder * * * and any of the rights connected with production, distribution or exhibition thereof, and any and all claims, manner of action and actions, cause and causes of action, suits, sums of money, accounts, damages and demands of any kind and character Jesse L. Lasky may have against Warner Bros. Pictures, Inc., or which arise out of or in connection with the motion picture "Sergeant York" against Warner Bros. Pictures, Inc.

(4) Pursuant to the authority granted to Seller in paragraph 4 in its said agreement with Jesse L. Lasky dated December 4th, 1942, Seller does hereby for and in the name of and on behalf of Jesse L. Lasky and his successors and assigns, remise, re-

lease and forever discharge Warner Bros. Pictures, Inc. and all of its subsidiary and affiliated corporations of and from all manner of action and actions, cause and causes of action, suits, duties, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims, and demands whatsover in law or in equity which against Warner Bros. Pictures, Inc. and its subsidiary and affiliated corporations the said Jesse L. Lasky now has or * * * may have in and to the receipts from the distribution and exhibition thereof or any part thereof and does further release and discharge the said Warner Bros. Pictures, Inc. from rendering any reports and accounts to him, from paying any money to him or in anywise be responsible for or have any duties to him by virtue of or arising out of the agreement and supplemental agreement both dated May 15, 1940 between him and Warner Bros. Pictures, Inc. and all supplements or amendments thereto, and he does hereby acknowledge that he does not have nor shall he have any rights or interest of any kind whatsoever in and to the motion picture, "Sergeant York", and Warner Bros. Pictures, Inc. is entitled to license, sell, dispose of, * * * the entire receipts for the world from the distribution and exhibition thereof as its sole and exclusive property without any accounting, demand or restriction of any kind.

* * * * *

Petitioner reported, in his return for 1942, one-

half of the payment of $805,000 as long-term capital gain from the sale of a capital asset, as follows: "Interest in picture Sergeant York 3-15-40 - 12-4-42, $402,500; gain to be taken into account, $201,-250.00." Petitioner's wife reported one-half of the same long-term capital gain in her return for 1942. The Commissioner rejected this treatment of the receipt of $805,000, giving the following explanation in the notice of deficiency:

It has been determined that $805,000 representing the proceeds from a contractual interest in the earnings and profits of the motion picture "Sergeant York" received from United Artists Corporation on December 4, 1942, is taxable as ordinary income received in the year 1942.

On August 11, 1941, Lasky sold to Warner Bros. all of his interest in the motion picture rights and other rights in the works covering the life of Mark Twain, purchased by him on July 10, 1941, from the Mark Twain Company, represented by Harold M. Sherman and Jervis Langlon, for $107,000, and an interest in the gross film receipts of a photoplay depicting the life of Mark Twain, such share in gross receipts being called "royalties." Lasky was employed by Warner Bros. as an associate producer of a photoplay depicting the life of Mark Twain, and he received from Warner Bros. for his services as an associate producer the sum of $126,175, at a weekly rate of from $1,500 to $1,750.

On August 11, 1941, Lasky sold to Warner Bros. for $50,000, all of his interest in motion picture and other rights in a literary property known as "A

Connecticut Yankee in King Arthur's Court" which he had purchased from the Mark Twain Company on July 10, 1941. Warner Bros. did not produce a photoplay based upon this literary property.

In about 1946, Lasky purchased a literary property, "Great Caruso." He was a producer for Metro-Goldwyn-Mayer of a photoplay entitled "Great Caruso."

Opinion

Harron, Judge: The question to be decided is whether a lump sum payment of $805,000 received by petitioner on December 4, 1942, is taxable in its entirety as ordinary income.

Various agreements are involved and at first the series of transactions appear to make the facts complicated. The ultimate question deals with the taxability of what petitioner received and we need not be diverted by the elaborate design set before us.

We think it is necessary to keep in mind the nature of the original transaction because the culmination of the series of transactions in petitioner's receipt of a lump sum payment of $805,000, in our opinion, reflects the nature of the first step.

Lasky acquired from York exclusive motion picture rights in the life story of the individual, Sergeant York, for which Lasky paid $25,000 and agreed to pay a percentage of the gross rentals of the motion picture based on that story. There can be no doubt that Lasky acquired a license to produce a film story, a motion picture, and that what York was to receive constituted royalties. Sabatini vs. Commissioner, 98 F. 2d 753, 755; Goldsmith vs

Commissioner, 143 F. 2d 466, certiorari denied, 323 U.S. 774; Rohmer vs. Commissioner, 153 F. 2d 61, certiorari denied, 328 U.S. 862; Commissioner vs. Wodehouse, 337 U.S. 369. We do not need to run this point back to analyze whether what York held was a copyright, or what York's interest in published books was. And since taxation is a practical matter, we need not be concerned about niceties in the definition of the word "royalty." Commissioner vs. Affiliated Enterprises, Inc., 123 F. 2d 665.

It was provided in the agreement with York, that all rights thereunder could be assigned, and Lasky assigned the rights and obligations under the agreement to Warner Bros. There were at least two agreements of Lasky with Warner Bros., since one of the agreements of May 15, 1940 was called a "Supplemental Agreement;" or there were three agreements. But, at this point, we need not become involved. Suffice it to say that we think all of the agreements with Warner Bros. made up one transaction between Lasky and Warner Bros. Substance rather than form is controlling. United States vs. Phellis, 257 U.S. 156. Warner Bros. received only the rights to produce a motion picture based on the York story which Lasky had acquired from York. That which Warner Bros. agreed to pay Lasky for his rights, namely, a percentage of the gross film rentals of the motion pictures were no doubt "royalties" to Lasky. Sabatina, supra; Goldsmith, supra; Rohmer, supra. It is immaterial that Warner Bros. also had to pay "royalties" to York. The arrangement simply was one under which Warner Bros.

was obligated to pay distinct royalties to two successive assignors of rights which were only a license. This result followed from Lasky's assignment of the York contract.

But if the above oversimplifies the arrangement, then it can be said, in the alternative, that Lasky's power to share in the proceeds of the motion picture was due to his contribution as a producer. What we said in Herman Shumlin, 16 T.C. 407, is appropriate here:

And the facts that a part of the proceeds originally took the form of a share in royalties for a license to employ the material in a motion picture, see Commissioner vs. Strauss (CCA-2), 168 Fed. (2d) 441, and that eventually petitioner received a lump sum in substitution, fail to deprive the whole transaction of that basic character. Shuster vs. Helvering, supra.

We think there can be no doubt that Lasky's share in the gross rentals of the York motion picture originally constituted ordinary income, taxable in its entirety to Lasky. He so regarded all of the payments, $196,216.80, which he accepted in 1941, which he reported in his return for 1941 as ordinary income.

This brings us to the lump sum payment of $805,000 in December, 1942. Warner Bros. credited to Lasky during 1942 in its account with him on its books, periodically, amounts which it recognized as his share of gross rentals under its agreement with Lasky. By the end of November 1942, the credits amounted to the total sum of $822,857.56. Lasky,

for reasons which are rather vague in the record before us, elected not to take the shares which accrued periodically and were tendered to him until it became clear that the credits alone would suffice because Lasky preferred having the accruals of his shares accumulate in the hands of Warner Bros. It is difficult to know, or to find as a fact, that a bona fide dispute existed in 1942 between Lasky and Warner Bros. At the most, the record before us contains only the suggestion that Lasky and his advisors were suspicious about the possible existence of grounds for challenging the propriety of Warner Bros.' computations of the dollar amounts of Lasky's shares, their accounting practice and procedure, and their handling of the release of the film. For example, there is no testimony of any executive of Warner Bros., about any dispute or about the receipt by Warner Bros. of allegations of Lasky. And the testimony of Lasky does not establish that suspicions crystallized during 1942 to issues in a real dispute.

The inference is plain, and we conclude, that by the end of 1942, Lasky reached a decision to step out of his contract with Warner Bros., and to terminate the contract. For example, in the document he executed with United Artists on December 4, 1942, Lasky authorized United Artists to execute any document to release and discharge Warner Bros. from paying any money to Lasky. United Artists in the document it executed with Warner Bros. on December 22, 1942, released and discharged Warner Bros. Warner Bros. closed its account with

Lasky and paid $820,000 in cash to United Artists, out of which amount United Artists was repaid the $805,000 which it had paid a few days previously to Lasky.

The credit balance under the Lasky-Warner Bros. agreement, $822,857.56, was closed on about December 22, 1942, by payment of $820,000 by Warner Bros. and $2,857.56 was charged to Lasky to take care of some undisclosed charge or adjustment. This ended and closed the Lasky-Warner Bros. contract.

The decision of the ultimate question requires that we construe the facts relating to the termination of the Lasky-Warner Bros. agreement. The petitioner does not concede that the issue should be posed in this way, but the realities of the matter compel us to see the situation as above described. We can conclude, only, from the steps taken that United Artists was a mere intermediary. There is no showing of any business purpose to Lasky in Lasky's arrangement with United Artists. In fact, the record is meager and sparse in providing any explanation for the few days' advance of funds to Lasky, which United Artists so quickly recouped out of Lasky's account with Warner Bros. through Warner Bros.' payment of $820,000. United Artists gained $15,000 for about 20 days' use of its $805,000 which it advanced to Lasky, and that was the only "business" aspect of the arrangement as far as United Artists was concerned.

There is ample authority for looking through the

form to the substance of the three-way arrangement in which United Artists played a brief role. Gregory vs. Helvering, 293 U.S. 465; S. A. MacQueen vs. Commissioner, 67 F. 2d 857; Canister Co., 30 B.T.A. 895, affd., 78 F. 2d 1013.

When the steps taken are seen in the above light, there was no more than an ending of the Warner Bros.-Lasky agreement, and Lasky received the accumulated "royalties," or shares, due him, the receipt of which had been held up.

The petitioner cannot succeed in this case by arguing that the contract or the contracts were "property;" and that "sales" were made of contracts. C. Schuster vs. Helvering, 121 F. 2nd 643; Herman Shumlin, supra.

Petitioner was entitled to receive payment of agreed shares of the gross film rentals of the York picture, and by the end of 1942, his shares had accrued and had been credited to him. This is not even a case where indeterminate or future payments were converted into a lump sum. Rather, this is a case where total accrued and credited payments were paid in a total amount based upon an agreement which had been carried out by the obligor to the extent of crediting and tendering payments upon an account inter partes. The alleged "sale" of the right to receive the accruals did not convert accrued income into capital. Helvering vs. Smith, 90 F. 2d 590, 592; Hale vs. Helvering, 85 F. 2d 819. There was, in fact, only payment of the total accruals to Lasky through an intermediary.

The respondent's determination is sustained.

Decisions will be entered for the respondent.

Served April 8, 1954.

The Tax Court of the United States
Washington

Docket No. 26396

BESSIE LASKY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated on April 8, 1954, it is

Ordered and Decided: That there is a deficiency in income tax due from this petitioner for the taxable year 1943 in the amount of $224,722.55.

/s/ MARION J. HARRON,
Judge

Entered April 8, 1954. Served April 9, 1954.

The Tax Court of the United States
Washington

Docket No. 26397

JESSE L. LASKY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated on April 8, 1954, it is

Ordered and Decided: That there is a deficiency in income tax due from this petitioner for the taxable year 1943 in the amount of $224,515.14.

/s/ MARION J. HARRON,
Judge

Entered April 8, 1954. Served April 9, 1954.

[Title of Tax Court and Causes 26396, 26397.]

MOTION FOR LEAVE TO FILE MOTION TO VACATE DECISIONS OUT OF TIME

Come now the above-named petitioners, by their attorney Robert Ash, and move the Court for leave to file a motion to vacate decisions out of time.

The reason for this motion is that equity and justice require the decisions to be vacated, as will be

seen by the statement of facts and supporting affidavits which will be filed in support of the motion to vacate the decisions.

Wherefore, it is prayed that this motion be granted.

/s/ ROBERT ASH,
Attorney for Petitioners

Served August 26, 1954.

[Endorsed]: T.C.U.S. Filed Aug. 24, 1954.

[Endorsed]: T.C.U.S. Granted Aug. 26, 1954.

[Title of Tax Court and Causes 26396, 26397.]

MOTION TO VACATE DECISIONS

Come now the above-named petitioners, by their attorney Robert Ash, and move that the Court vacate the decisions entered in these cases on April 8, 1954.

A statement of facts and supporting affidavits in support of this motion will be filed in the near future.

August 23, 1954.

/s/ ROBERT ASH,
Attorney for Petitioners

[Endorsed]: T.C.U.S. Lodged August 24, 1954.

Served and Filed August 26, 1954.

[Title of Tax Court and Causes 26396, 26397.]

AFFIDAVITS IN SUPPORT OF MOTION TO VACATE DECISIONS

In support of the Motion to Vacate Decisions, filed herein on August 24, 1954, the petitioners file the following affidavits:

1. Affidavit of Jesse L. Lasky, dated September 7, 1954.
2. Affidavit of Randolph Rogers, dated September 7, 1954.
3. Affidavit of Herschel B. Green, dated September 7, 1954.
4. Affidavit of Harrison Harkins, dated September 7, 1954.

September 10, 1954.

/s/ ROBERT ASH,
Attorney for Petitioners

AFFIDAVIT OF JESSE L. LASKY

State of California,
County of Los Angeles—ss.

I, Jesse L. Lasky, being first duly sworn, upon oath deposes and says:

1. I am the petitioner in the proceedings in the Tax Court, known as Docket No. 26397.

2. On April 14, 1954, I attended a conference in the office of my attorney in Los Angeles, California, at which there were present: Mr. Loyd Wright, Mr. Herschel B. Green, Mr. John B. Milliken, Mr. Har-

rison Harkins, and my secretary, Mr. Randolph Rogers. At this conference, we discussed the findings of fact and opinion of the Tax Court, dated April 8, 1954, in my case, Docket No. 26397 and in the case of my wife, Bessie Lasky, Docket No. 23696. We also discussed what further action should be taken as a result of the findings of fact and opinion. In the course of our discussions, I was informed by my attorneys that they would, in due course, receive from the Tax Court its decisions pursuant to the findings of fact and opinion and that after the decisions were entered, I would have three months within which to appeal from the Tax Court's decisions.

3. On numerous occasions since this conference in April, 1954, both my secretary, Mr. Randolph Rogers, and I, have called my attorneys, Mr. Herschel B. Green and Mr. Harrison Harkins to inquire as to whether the decisions of the Tax Court had been received. We were informed on each of these occasions that the decisions had not as yet been received and were again assured that we would have three months after the decisions had been received within which to appeal.

4. On or about August 2, 1954, I was informed by Mr. Herschel B. Green that in going through his file in my case, he had discovered that the decisions in my case and the case of my wife, Bessie Lasky, were in the file and that these decisions were dated April 8, 1954. He further informed me that these decisions had apparently been in the file when I was in his office on April 14, 1954 and had the con-

ference to discuss the Tax Court's findings of fact and opinion with the gentlemen listed above. This was the first information that I had received that the decisions in my case and the case of my wife had been entered by the Tax Court.

5. When Mr. Green advised me that he had discovered the decisions in his file, I requested that he send them to me. He complied with my request and sent them with a letter, dated August 5, 1954. A copy of Mr. Green's letter of August 5, 1954 is attached hereto and made a part of this affidavit by reference.

6. Immediately upon receipt of Mr. Green's letter, referred to in the preceding paragraph, I flew to New York City to seek advice as to what could be done, as I fully intended at all times to appeal the Tax Court's decisions. I was informed in New York that my only recourse was to file a motion to vacate the decisions.

7. On August 11, 1954, the District Director of Internal Revenue at Los Angeles forwarded to me a notice and demand for taxes assessed pursuant to the Tax Court's decisions. The amount assessed against me and my wife, including interest, as set forth in the said notice and demand, was in the amount of $729,389.69.

8. I am 74 years of age. My wife is 66 years of age. I do not have sufficient assets to pay the deficiencies in tax as determined by the Tax Court or a substantial part thereof. Because of this fact, I feel that I should not be deprived of my right of appeal to the Court of Appeals, especially when any

failure to appeal was in no way due to action or lack of action on my part.

/s/ JESSE L. LASKY

Subscribed and sworn to before me this 7th day of September, 1954.

[Seal] /s/ ESTELLE COLVIN,
Notary Public

[Letterhead of Wright, Wright, Green & Wright]

Mr. Jesse Lasky, August 5, 1954
California Studios,
650 North Bronson, Los Angeles 4, California

Dear Mr. Lasky:

Agreeable to your telephone request, there are enclosed the decisions of The Tax Court in Mrs. Lasky's and your tax cases.

You will note that these decisions are dated April 8, 1954. They did not come to my attention until I discovered them in going through the file last week. They came in separately from the two opinions and were apparently here in the office at the time when we held the conferences with Judge Milliken, Mr. Harkins and others to discuss the contents of the Court's opinion.

I had been on the look-out for these decisions from the inception due to our discussions relative to an offer in compromise.

Sincerely,

/s/ HERSCHEL B. GREEN

HBG:DN—Enclosures

AFFIDAVIT OF RANDOLPH ROGERS

State of California,
County of Los Angeles—ss.

I, Randolph Rogers, being first duly sworn, upon oath deposes and says:

1. I am Secretary to Mr. Jesse L. Lasky, who is the petitioner in the proceedings in the Tax Court, known as Docket No. 26397.

2. On April 14, 1954, I attended a conference in the office of Mr. Loyd Wright, attorney, in Los Angeles, California, at which there were present: Mr. Loyd Wright, Mr. Herschel B. Green, Mr. John B. Milliken, Mr. Harrison Harkins, and Mr. Jesse L. Lasky. During the discussion of the tax cases of Jesse L. Lasky and Bessie Lasky, the attorneys present stated that after the Tax Court had entered its decisions in this tax case, Mr. Lasky would have three months within which to appeal from the Tax Court's decisions.

3. During the weeks that followed this conference in April, 1954, on each occasion when I endeavored to keep track for Mr. Lasky of the receipt of the decisions, I was informed by Mr. Harrison Harkins that he, or Mr. Herschel B. Green, would notify Mr. Lasky promptly of the receipt of the decisions from the Tax Court. I recite one specific occasion, when Mr. Lasky and I had an interview with Mr. John B. Milliken and Mr. Harrison Harkins in their office on or about May 24, 1954, when Mr. Harkins stated that the decisions would certainly be forth-

coming almost any time; that he could not account for the delay, and again assured us that there would be three months after the decisions had been received, within which to appeal.

4. On or about August 2, 1954, Mr. Herschel B. Green telephoned Mr. Lasky's office, and when I answered the telephone, Mr. Green asked me to advise Mr. Lasky that he had overlooked the receipt of the decisions; that he discovered the decisions in his file bearing the date of April 8, 1954, and also stated that undoubtedly the decisions had been in his file at the time the conference took place in Mr. Loyd Wright's office on April 14, 1954. This information from Mr. Green on or about August 2, 1954, was the first word Mr. Lasky, or I, had received that the decisions had been entered by the Tax Court. Mr. Lasky immediately telephoned Mr. Harrison Harkins, and as I listened in on the telephone, I heard Mr. Harkins inform Mr. Lasky that he, also, had just been advised by Mr. Green that the receipt of the decisions in April, 1954, had been overlooked, and Mr. Harkins said to Mr. Lasky that he was shocked over this negligence and unfortunate circumstances.

/s/ RANDOLPH ROGERS

Subscribed and sworn to before me this 7th day of September, 1954.

[Seal] /s/ ESTELLE COLVIN,
Notary Public

AFFIDAVIT OF HERSCHEL B. GREEN

State of California,
County of Los Angeles—ss.

Herschel B. Green, being first duly sworn, deposes and says:

That he is an attorney duly licensed to practice in all courts of the State of California and before the United States Court of Tax Appeals; that he is one of the attorneys of record in the cases of Bessie Lasky vs. Commissioner of Internal Revenue, Docket No. 26396, and Jesse L. Lasky vs. Commissioner of Internal Revenue, Docket No. 26397.

That he is connected with the firm of Wright, Wright, Green and Wright, whose offices are at 111 West 7th Street, Los Angeles, California.

That shortly after April 8, 1954, there were received at the aforesaid offices the Findings of Fact and Opinion of the Tax Court in each of the above cases.

That shortly after the receipt of these Opinions, a conference was held at said offices, which was attended by Jesse L. Lasky, Randy Rodgers, his secretary, Harrison Harkins and Judge John B. Milliken, who are practicing attorneys in Los Angeles, Loyd Wright, one of the attorneys for the taxpayers in each of the above cases; that your affiant sat in on a part of said conference.

That at said conference, the decisions were discussed at great length, including such things as the possibility of having said decisions reversed on appeal, the possibility of a compromise of the tax de-

ficiency, and other matters relating to said tax controversy.

During said conference it was pointed out to Mr. Lasky that the Tax Court Decisions in the two cases would be received separately from the Findings of Fact and Opinions, and that he would have three months from and after the date of said Decisions within which to file an appeal. Affiant promised to notify Mr. Lasky immediately upon the receipt of said Decisions.

Thereafter, Affiant talked with Mr. Lasky, or his secretary, on two or three occasions, when Affiant was asked if the Decisions had been received, and Affiant informed him on each occasion that they had not. During one or two telephone conversations with Mr. Harkins, we made mention of the fact that the Decisions had not been received and that Affiant was keeping a constant lookout for the reecipt of these Decisions, having in mind the ninety-day appeal period above referred to.

On or about July 26, 1954, Mr. Harkins informed Affiant that he had received word from the desk of the Tax Clerk that the Decisions had been entered in the two cases on April 8, 1954, and that copies thereof had been mailed to us. Affiant thereupon made an immediate search of the Lasky files in his office, and at that time and for the first time discovered copies of the two Decisions. They were on letter-size paper and had been permanently placed in one of the Lasky files on the correspondence side of the file rather than the legal side. Affiant thereupon, on that same day, telephoned Mr. Lasky and

informed him that in going through his files Affiant had found the two Decision and *they* they were dated April 8, 1954.

/s/ HERSCHEL B. GREEN

Subscribed and sworn to before me this 7th day of September, 1954.

[Seal] /s/ ANITA GARRETT,
Notary Public in and for the County of Los Angeles, and State of California.

AFFIDAVIT OF HARRISON HARKINS

State of California,
County of Los Angeles—ss.

Harrison Harkins, being first duly sworn, deposes and says the following:

That he is one of the attorneys of record in the above-cited proceedings;

That he received from the Court a copy of the Findings of Fact and Opinion which was promulgated on April 8, 1954, in the proceedings;

That on April 14, 1954, after receipt of a copy of the Findings of Fact and Opinion, he attended a conference at the offices of Loyd Wright and Herschel B. Green, attorneys of record for the above-named petitioners, at which Jesse L. Lasky was present;

That at said conference the Findings of Fact and Opinion were discussed in detail, as well as the

procedures for appeal from the decisions when rendered;

That Jesse L. Lasky was informed at the conference that the decisions of the Court would be rendered separate from the Findings of Fact and Opinion, and that he and Mrs. Lasky could file petitions for review of the decisions within three months after the decisions were rendered. And Mr. Lasky was told that he would be informed when service of the decisions was made on counsel of record in the proceedings;

That at the time of said conference (April 14, 1954) and up to July of 1954, the affiant was not aware that the decisions of the Court in the proceedings had been rendered, entered, and served;

That at various times between April 14, 1954, and July 26, 1954, the affiant talked with Herschel B. Green, counsel of record in the proceedings, and was informed that the decisions had not been served on counsel;

That affiant has never been served with copies of the decisions;

That at various times between April 14, 1954, and July 26, 1954, your affiant, in answer to inquiries by Jesse L. Lasky and his secretary, Randy Rodgers, informed Mr. Lasky and Mr. Rodgers, as the case may be, that the affiant had not been served with copies of the decisions, and that Mr. Green had informed your affiant that the decisions had not been served on Mr. Green;

That under date of July 20, 1954, your affiant

wrote to the Clerk of the Court and inquired about the status of the proceeding;

That on July 26, 1954, your affiant received a letter from the Clerk of the Court, dated July 23, 1954, informing him that the decisions had been entered and had been served April 9, 1954, upon the first counsel of record in the proceedings, Herschel B. Green, Esq., 111 West Seventh Street, Los Angeles 14, California;

That on July 26, 1954, your affiant informed Mr. Green of the communication from the Clerk of the Court; and Mr. Green on the same date informed your affiant that copies of the decisions had been found in the files of his office;

That on July 26, 1954, Jesse L. Lasky informed your affiant that Mr. Green had that day told him that copies of the decisions had been served on Mr. Green.

/s/ HARRISON HARKINS

Subscribed and sworn to before me this 7th day of September, 1954.

[Seal] /s/ PEARL ANDERSON,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: T.C.U.S. Filed September 10, 1954.

[Title of Tax Court and Causes 26396, 26397.]

HEARING ON RESPONDENT'S MOTION TO VACATE DECISIONS

Courtroom No. 1, Internal Revenue Service Building, Washington, D. C., Tuesday, September 14, 1954.

The above-entitled matter came on for hearing, pursuant to notice to the parties, at 2:05 p.m.

Before: Hon. Marion J. Harron, J., presiding.

Proceedings

The Clerk: Docket No. 26396 and 26397, Bessie Lasky and Jesse L. Lasky.

Mr. Ash: Robert Ash, for the Petitioners.

Mr. Ray: John T. Rogers, Rollin H. Transue, and C. A. Ray, for the Respondent.

The Court: Mr. Ash, I have received a motion in this case and also affidavits in support of the motion to vacate decisions.

I am acquainted with the problem in this case which is unfortunate and unusual. I would like to say before you go ahead that I anticipate that you would like to file a memorandum of authorities. Perhaps you intend simply referring to your authorities orally. Whichever you do, I am going to give this matter very careful consideration and do not intend deciding the matter from the bench.

However, you will want to have some idea of how long the matter will be pending before me because time has been a problem in this particular matter.

I expect to have a two-week calendar away from Washington beginning next week and, if you want to file a written memorandum of your authorities because the question is entirely a question of law, then I expect that two weeks will be sufficient time, or you may have more; but I want to make the ruling and if necessary write whatever has to be written during the month of October.

Now, if you have any suggestion with respect to time and procedure, please feel quite free to suggest them at the conclusion of your argument or when we end the hearing on this matter.

We are very sorry that this has happened; we know what the problem is. And I would be glad to hear whatever you have to suggest under all of the circumstances.

Mr. Ash: I think that I appreciate Your Honor's attitude in the matter, and I think the time suggested is entirely satisfactory.

We have done considerable research and the authorities are extremely limited. However, there are a few authorities on the same general subject. I might say that the incident has made me realize even more than before how important it is that the Tax Court become a court of record because the modern trend of law is that any final judgment may be set aside in order to accomplish justice; and this rule or modern trend is specifically set forth in Rule 60(b) of the Rules of Civil Procedure and based, of course, on some pretty well-established decisions.

But the thing that has bothered me is to what

extent the Tax Court in its present status can feel that it is bound by the Rules of Civil Procedure. There is no doubt but what everyone thinks of the Tax Court as a court. Its proceedings are judicial proceedings, but the basic law creating it does not designate it as a court and, as I say, it is a pretty important question as to whether the Court would feel that it could in any way adopt or follow the Rules of Civil Procedure. My strongest authority is based upon the provision of Rule 60(b) of the Rules of Civil Procedure, which states in part that:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect;"

And that seems to stem back to situations where, due to failure of counsel the rights of people have been prejudiced and the courts have tried to assist and do justice to people who, say, have been prejudiced by the failure to act or improper action of counsel.

In this particular case one of the things that concerns me very much is that I hope that can be handled in such a way as not to unduly embarrass the senior member and the very fine lawyer who is the senior member of the law firm where the oversight was made. Anyone who has practiced law of course knows that you can lose papers and that is really what happened in this case.

The decisions were just overlooked or lost, misplaced in the file and, despite the repeated requests

of Mr. Lasky, he was told that the decisions had not as yet been received and he was repeatedly told that he would have three months after the receipt of the decisions to decide what to do.

Now, whether or not Mr. Lasky has any valid grounds for appeal, he feels very strongly and probably will feel as long as he lives that, if he did have this right of appeal, possibly the result would have been different; and I know of no way of changing his opinion on it.

The Rule of Civil Procedure grows out of long established case law one of which is Cagnon vs. U. S. 193 U. S. decided in 1904, and in that case the Supreme Court in what might be construed to be dicta made this statement:

"The power to amend its records, to correct mistakes of the clerk or other officers of the court, inadvertencies of counsel, or to supply defects or omissions in the record, even after the lapse of term, is inherent in courts of justice."

Now, when we get to the Board of Tax Appeals and Tax Court authorities, I can only find one case that seems to be fairly close and that is a case known as La Floridienne J. Buttgenbach & Co., which was decided by the Fifth Circuit and is reported at 63 F.2d 630, A.F.T.R. 257. I do not have a Board of Tax Appeals citation on that.

The case arose as follows: In 1927 the parties stipulated that this taxpayer owed a certain deficiency in tax. As a result of that stipulation, the Board of Tax Appeals entered a decision. In 1931, nearly four years thereafter, the Commissioner ad-

mitted that the tax was erroneous and the parties filed a joint petition with the Board of Tax Appeals asking that the decision of January 19, 1927, be vacated, set aside, and to enter an order of no deficiency.

The Board of Tax Appeals, I believe it was Judge Sternhagen, denied this joint petition. It then went to the Fifth Circuit and, citing some of the law of the charge that I have just mentioned, they reversed and as a consequence the taxpayer did get the relief requested.

That is the only case directly in point that I can find and that is distinguishable to this extent: That in the case that I have just cited there was no trial on the merits. It was disposed of by stipulation.

Whether that affects the problem, I am not prepared to say; but anyway the Fifth Circuit did reverse.

Now, in another case a little, somewhat related to it, the case of Smith vs. Commissioner, 67 F.2d 167 12 A.F.T.R. 1372, which affirmed 26 B.T.A. 778, Judge Marquette entered a decision against the Petitioner individually rather than as administrator of an estate and the Petitioner argued that the decision became final after the lapse of the period within which to appeal.

The Court of Appeals affirmed the position of the Commissioner but in its opinion says this:

"Being valid, the order became final on November 10, 1932 and the power of the Board of Tax Appeals over the order ended except the power that it unquestionably had to enter a nunc pro tunc order,

correcting the error, as requested on behalf of the respondent in the motion of December 16, 1932."

I say that again might have been dicta, but it is in the decision and there is a tremendous amount of state law which I shall put in the memorandum, general law, that courts can and do remedy situations of this general nature under the same expression that is contained in the Rules of Civil Procedure.

I would be less than frank if I did not say that one of the great things we are all seeking for in tax cases is to get finality and, of course, hard cases make bad law; but this is a really hard case and it could be extremely embarrassing to the very distinguished lawyers whose office made the mistake.

I can amplify the authorities. If the Rules of Civil Procedure are applicable, could be held to be applicable, I don't think there would be any question about the power of the Tax Court to set aside and vacate these decisions and give this man and his wife the right of appeal. I am not at all convinced in my own mind one way or the other as to whether or not the Rules of Civil Procedure apply. They are pretty good rules in a lot of ways.

I think, as I stated at the outset, that if they do not apply it is certainly another very strong argument why this Count should be made a court of record. I am here largely on equitable grounds and I have really nothing else to argue. I purposely haven't stated the facts.

The Court: Do you take the position that the

facts were all set forth in these affidavits that were filed with the Court?

Mr. Ash: I believe they are, Your Honor, and I might state that I did not draft these affidavits except that I wrote a rough draft of the affidavit for Mr. Lasky based upon the facts as he disclosed them to me and when I met him in Chicago at the time the American Bar was meeting there and we saw the senior member of this law firm who was then in Chicago.

As to the other affidavits, I told him if he could get Mr. Green and the other people who have executed affidavits to give their version of it, why, it would be helpful. So they worded their own affidavits and certainly unqualifiedly took the responsibility for what happened.

The Court: Thank you, Mr. Ash.

Mr. Ray: May it please Your Honor, as you stated when you first opened the hearing we regret that this decision has arisen, but our position is that we object to the granting of this motion on the grounds that the Tax Court has no jurisdiction to either entertain or grant the motion.

We, with Your Honor's permission, will file at the close of the hearing a memorandum of authorities and will furnish counsel with a copy of that memorandum of authorities.

I notice that Mr. Ash mentioned the Buttgenbach case and he stated the facts in that case with which statement we have no quarrel, but in that case, in the opinion which Your Honor will read, you will

note that they stated that they limited the application of that decision as follows:

"We rule only that a redetermination based on a stipulation may be vacated at the instance of the parties to the stipulation for good cause shown."

I do want to point out for Your Honor's consideration the fact that the return of these taxpayers was filed within the jurisdiction of the Ninth Circuit Court of Appeals. Any appeal from Your Honor's ruling in the absence of a stipulation by the parties would go to that circuit. That circuit has ruled on the precise point that is before Your Honor today in the Swall case, the identical situation, the only difference in fact being the lapse of time.

Namely, in that case there was a longer period before the decision of the Tax Court became final. And in the opinion of the Court of Appeals for that circuit they state that at least as far as they are concerned they do not follow, and in effect I believe they state that the Buttgenbach case is no longer the law since the decision of the Supreme Court in the Coal case.

Now, I do not intend to go into any details in this case because there is no conflict as to the facts and we furnish you with the authorities, but there are two facts that I want Your Honor to bear in mind: (1) the Tax Court had no part in this error; (2) the Respondent had no part in the error. And at the conclusion of the hearing with Your Honor's permission I would like to file a memorandum of authorities.

The Court: There is another fact, gentlemen,

that I think must be mentioned for the record since the facts are not being presented at this hearing on the motion and since part of the record is found in the affidavits which have been filed in support of the motion to vacate the decisions.

Now one fact is this: The Tax Court in its use of the mails to make service on the parties sends decisions and other papers by registered mail and a registered mail record is kept. In some, if not all, instances a registered mail return receipt card is involved.

Now, the records of the Tax Court show that the decisions in Docket Nos. 26396 and 26397 were sent by registered mail and, as I understand from Mr. Ash's statement, the Petitioners here do not deny that copies of the order of this Court, which is called a decision, were received in the office of Mr. Herschel B. Green in Los Angeles under registered mail. The decisions were mailed to Mr. Green's office because he was the attorney who first entered his appearance.

Now, Mr. Ash, I am going to mention another fact. I think I must do this for the record. It is known that Tax Court judges travel. Therefore, at times they are necessarily away from their offices in Washington. There is no record in the Tax Court of the receipt of any letter of inquiry from any of the attorneys who entered their appearances in these cases. Mr. Harrison Harkins tried the case. He is associated with one law firm in Los Angeles. Am I correct in that?

Mr. Ash: Yes, Your Honor.

The Court: There were two other attorneys who entered their appearances in this case. They were associated with another law firm. I believe that is correct, or is Mr. Harkins in the same firm?

Mr. Ash: Mr. Harkins is in Judge Milliken's firm and Mr. Green is in another firm.

The Court: Now, you haven't told, Mr. Ash, and of course I want to have the record show that Mr. Ash has entered his appearance in connection with this motion asking the Court to vacate the orders which are called decisions, and Mr. Ash did not have any association with this case until very recently——

Mr. Ash: That is right, Your Honor.

The Court: ——until after the period for appeal had expired. So he is not involved in any way in the problem except to make a plea to the Court to act if it can do so in the interest of justice.

Now, Mr. Ash, have you been advised whether or not any of the attorneys associated or even the taxpayer ever wrote to the Tax Court to ask if and when a decision would be entered or why a decision hadn't been entered or anything of that kind?

Mr. Ash: As I understand the situation, because of this apparent delay in receiving the decisions, Mr. Harkins on July 20 wrote to the Clerk of the Court and inquired about the status of the proceeding. In other words, that was later than three months, that was after the three months had expired; and on July 26, 1954, Mr. Harkins received a letter from the Clerk dated July 23 informing him that the decisions had been entered and had

been served April 9, 1954, upon the first counsel of record in the proceedings, Herschel B. Green. That is set forth in Mr. Harkins affidavit which is filed.

The Court: The date for appeal expired on what date, 90 days from April 8 I believe?

Mr. Ash: It would be July 8 or thereabouts. It is three months I think in the statute. So it would be July 8.

Mr. Ray: The statute is three months, not 90 days.

The Court: Well, this division of the Court never received any letter of inquiry from counsel. During that period I was in Washington most of the time I believe but, even if I had been out of town, my secretary is always instructed to communicate with me about matters that come up in my office.

Then there is another point about the procedure of this Court that ought to be mentioned in this record. The Court issues its own rules of practice. There is a rule that is very well-known to members of the Tax Bar called Rule 50, and it is well-known that, when there must be a recomputation of the amount of a tax deficiency under a decision of the Tax Court, the parties make that recomputation, not the Court, and Rule 50 is a rule which makes it clear and gives the parties the opportunity to file the Rule 50 computation.

At the end of a report of the Court we indicate how a decision is to be entered. At the end of a report of this Court a legend appears which is apart from the text. It is like an addendum. It says, "Decision will be entered under Rule 50" or "De-

cision will be entered for the Petitioner" or "Decision will be entered for the Respondent."

If a decision is to be entered under Rule 50 some time must elapse during which each party will make a computation of the tax due under the Court's decision and the amount of deficiency in tax or the amount of overpayment if there has been any and that recomputation when it is made is filed with the Court and then there is a hearing on the recomputation if the parties are not in agreement and, if they are in agreement, that is indicated by the parties and The Court then enters an order which is called a decision in accordance with a Rule 50 recomputation.

Sometimes two or three months will elapse between the date of the promulgation of a report of the Court and the entry of its order which is called a decision during which time the parties have been working on a Rule 50 recomputation and the Court has been waiting to receive it, but when the legend at the end of a report says, "Decision will be entered for Petitioner" or "Decision will be entered for Respondent" there is no reason for the Court to delay entering its decision unless the pressure of business of the Court is such that the judge who wrote the report in the case, the findings of fact and opinion, can't sign an order of decision. The judge might be ill; the judge might be away from Washington at the time the report is promulgated.

It is promulgated as far as this Court is concerned, as far as the entry of the decision is concerned, under a mimeographed report. The mimeo-

graphed report may be a memorandum of findings of fact and opinion, or it may be a printed findings of fact and opinion which becomes published in our reports, but we don't wait for the Government Printing Office to send back the printed copy of the promulgated report.

This division of the Court made the suggestion to the Chairman of the Board years ago that the taxpayers could be saved the time of waiting to receive the report of the Court if they were served mimeographed copies of the kind of report that is not a memorandum opinion.

We used to require the parties to wait a month or so before they learned what the verdict of this Court was, waiting on the Government Printing Office. We don't do that any more. We mimeograph our memorandum findings of fact and opinion and we mimeograph our published findings of fact and opinion and, upon the mimeographing right here in the office of the Court, we are then ready to enter the order which is called a decision.

Unfortunately, because the work of this Court is very heavy, some cases are pending in this Court for a long time and that is a problem with which we live and over which we have no control. We know that judges are sometimes called dilatory and maybe they sometimes are, but in this Court the time during which a proceeding is before us for decisions isn't because the judges are dilatory, and when it comes to entering these orders we are not dilatory. We act promptly.

In the case of this division of the Court we have

mail following us all over the United States so that we are acting as promptly as we can even when we are away from Washington.

So the question must come up as to why no inquiry was made until July 20 about the decision since the legend under the findings of fact and opinion said, "Decision will be entered for the Respondent." There was no Rule 50 computation to be made. The order of decision was entered immediately upon the "filing" officially of that findings of fact and opinion.

The case had been pending before the Court for a long time, but the order of decision was entered promptly; and that is a picture of the way this Court has to function. We may appear to require a lot of time in considering cases but we act promptly when we can do so.

Gentlemen, the chief judge of the Court and this division of the Court are sympathetic about this problem. We realize that it is a matter of great concern to the taxpayers and they are the principal parties to be considered. It is a part of the system under which we function for the taxpayer to go before more than one Court and he considers that he has the right of appeal.

Regardless of what kind of entity this organization is, it serves as a trial court, and it certainly confuses the function of this Court in the minds of the people for some members of the bar to insist on writing arguments and advancing the theory, as was recently done in the Journal of the American Bar Association, that this agency is not a court. It

is a court of limited jurisdiction and the question that is involved here may touch upon that point of the limitations of our jurisdiction.

But people feel that they have a right to appeal from our decisions. We think they have a right to appeal although we do our best to consider questions so thoroughly so that it won't be necessary in every case to appeal, because litigation is lengthy and it is expensive.

We are sympathetic with the concern of Mr. and Mrs. Lasky. We are also sympathetic about the embarrassment of counsel. The affidavits will be very carefully considered and this division of the Court will do its utmost to determine what it can properly do. We will be very glad to have all the assistance that counsel can provide in trying to do a matter of equity in this case.

There are statutes of limitations in the statutes. Those limitations are there for a purpose, but I assure you, Mr. Ash and Respondent's counsel, that this very unusual situation presents a challenge and we will do our best to, in a thoroughly judicious way, meet that challenge.

Mr. Ray: May it please Your Honor, my colleague Mr. Transue has called to my attention an observation by the Second Circuit in the Sam Katz case that the Rules of Civil Procedure did not apply to hearings of the Tax Court. I haven't read the case but, for whatever use it may be, I call it to counsel's attention. He may wish or may not wish to comment on that observation.

The Court: Mr. Ash, would you like to suggest

a time within which you would file a memorandum? I have no desire to fix any time and I would be glad to meet your convenience. I have explained to you that my schedule keeps me away from Washington for two weeks until about October the 11th. I might say that I have to go to New York during the week of October the 18th and whether I will be there one week or two weeks I don't know. You know from your own experience that it is hard to tell how calendars will run.

Mr. Ash: Will it be reasonable, Your Honor, to suggest October 11?

The Court: That will give you plenty of time?

Mr. Ash: I think so because we have already spent a lot of time.

The Court: Very well.

Mr. Ray?

Mr. Ray: With Your Honor's permission I would like to give to the Court now our memorandum of authorities, and we have covered, we think, most all the important cases dealing with appeals of this sort, directly to the point. We haven't gone into cases from the state courts or from the district courts because we consider, as Your Honor just stated, that they may or may not have any applicability because of this being a court of limited jurisdiction governed by statutory rules which the Supreme Court has enunciated in both the Northern Coal and the Simpson case dealing with the situation we have here today.

I would like to file this memorandum file and furnish counsel with a copy.

The Court: The Respondent's memorandum is received and Petitioners will have until Octomer 11 to file a reply to Respondent's memorandum.

I believe that is all.

(Thereupon, at 2:50 p.m., the hearing in the above-entitled petition was closed.)

[Endorsed]: T.C.U.S. Filed September 20, 1954.

[Title of Tax Court and Causes 26396, 26397.]

SUPPLEMENTAL HEARING OF RESPONDENT'S MOTION TO VACATE DECISIONS

Courtroom No. 1, Internal Revenue Service Building, Washington, D. C., Thursday, September 16, 1954.

Met, pursuant to notice, at 1:30 p.m.

Before: Hon. Marion J. Harron, J., presiding.

Proceedings

The Clerk: Docket Numbers 26396 and 26397, Bessie Lasky and Jesse L. Lasky.

The Court: This will resume the hearing on the motion of the Petitioner's to vacate the decisions. I have been trying to sandwich in some work on this matter and I was very much interested in Mr. Ash's suggestion about the provisions of Rule 60 (b) in the Rules of Civil Procedure applicable to the United States Courts.

I have looked at our own rules to see what we have set forth on the matter. Then I thought per-

haps I had a suggestion that might be helpful to you and that really initiated my message to you asking you to come back for a few minutes today.

I am afraid my suggestion is not any good, I am sorry to say. I will be glad to tell you about it some time. Then, in looking at Rule 60(b) I ran across something that was quite disturbing. The reference to Rule 60(b) is, as I understand it, a suggestion to this Court about its discretion. The Rules of Civil Procedure of District Courts do not apply to this Court and so it would be a matter of suggestion to us about how we might use our own discretion.

When I got to a footnote on Rule 60(b), I find this:

"Note to Subdivision (b). Application to the Court under this subdivision does not extend the time for taking an appeal, as distinguished from the motion for a new trial. This section is based upon California Code Civil Procedure (Deering 1937) paragraph 473."

Then there are some other references.

I would like you to look at this Mr. Ash, and tell me whether I get the right understanding of that.

Mr. Ash: This note certainly is as clear as language can be. The latest annotations might possibly throw some light on the matter.

The Court: I looked in our library last night for the latest definition we have without the assistance of the librarian. That was the latest I could find.

Mr. Ash: The Rule itself says that "a motion under this subdivision (b) does not effect the finality of a judgment or suspend its operation. This rule does not limit the power of a Court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. Section 1655, or to set aside a judgment for fraud upon the Court."

The Court: I take it those sentences are material here. Looking at our own rules, Rule 19 (e) seems to come the closest to it: The Court by special leave can allow a motion to vacate or revise a decision which has been entered even though the motion is filed more than 30 days after the decision has been entered.

When you prepare your brief, Mr. Ash, I hope you will spare my having to run down this point. The Rules of Civil Procedure were revised pursuant to an Act of Congress and, as we all know, the purpose was to do away with some rather archaic rules of procedure which were burdensome and not in keeping with our modern law system. That, I guess, is all I need to say about the purpose of it. However, any court, whether it is the District Court or this Court, I presume, would have to consider the relationship of Rules of the Court to statutory provisions, and that is something that the new Rules of Civil Procedure do not reach or adjust at all as far as I know.

For purposes of analogy or comparison, our modest little set of Rules of Practice before this

hardworking agency, regardless of its status, can be compared to the Rules of Civil Procedure in District Courts, but neither the Rules of Procedure in the District Courts, nor our little Rules of Civil Practice can set aside the operation of any statutory provisions. Therefore, if you intend arguing about the equitable aspects of the Rules of Civil Procedure, I hope that you will be good enough to advise The Court whether you admit, as I think you must, that even the Rules of Civil Procedure in the District Court, for example, cannot extend the running of the statutory period. If that is actually true as a matter of law, then I guess we will have to face that.

Is there anything you would like to inform me about now with respect to what I have been giving my thoughts to?

Mr. Ash: If Your Honor please, I must admit, as I indicated Tuesday, that my authority is pretty slim. I did find at least two expressions that I mentioned in court actions and I hope that we can between now and the 11th of October develop some reasonable argument to support our position. I know the Supreme Court now has that authority that it can change its decision. It can enter orders apparently at any time irrespective of any limitations.

The Court: It is the highest court. There is no appeal from that court.

Mr. Ash: Well, it may be that they have statutory authority to do that. I am not certain.

The Court: On the one hand is the statute. Even

the new Rules of Civil Procedure were enacted pursuant to a statute of Congress. It is quoted in the front of that Lawyers Association volume that I handed you. There is a provision in the Internal Revenue Code which says that the Board of Tax Appeals may promulgate its own rules of procedure. Then the Rules of Procedure are adopted pursuant to some authorization, but they are at a lower level of course than the statute over here, so I would presume that the Rules of Civil Procedure applicable to the district courts occupy that status, too. They are subordinate to statute. If you can help me with what seems to be an impediment there, I will be glad to have you do that.

I wonder, Mr. Ash, if any explanation has been given to you about why Mr. Harkins, for example, waited so long to ask Mr. Mersch about the entry of the decisions. As you all know, decisions to be entered for Petitioner and Respondent, even if you had a complicated order to write, would not take more than a half hour to have drafted, typed, and signed. It is very easy to find out from the Clerk whether the judge is on the job or is sick, or is in Washington or away on a Calendar, and what I cannot understand is what Mr. Harkins, who tried this case, was thinking of.

What did he think I was doing? Why did he think it would take me three months to have prepared and signed an order which takes not more than a half hour to get done?

I have looked in the file to see if there was a motion for reconsideration filed or if there was any

motion pending that would give Mr. Harkins or any of the counsel ground for thinking that while a motion for reconsideration was being considered a decision would not be entered or something. Have you any explanation?

Mr. Ash: The only explanation I have is—first of all, I will preface it by saying that any of us who do tax work would certainly take the position that Your Honor is taking, because you recognize that the decision would be simultaneous practically with the findings of fact and opinion except in some unusual situations like you mentioned. The only possible explanation is that, of course, Harkins did repeatedly ask Mr. Green if the decisions had come down and was assured that they had not.

As I understand it, for some reasons the Tax Court sent copies of the findings of fact and opinion to each of the counsel of record but, of course, following the established practice that we all know, the decisions went only to Mr. Green.

The Court: That still does not give me an answer to the question.

Mr. Ash: I do not know the answer.

The Court: Mr. Harkins could call Mr. Green 20 times and Mr. Green could say "We haven't received a copy of the decision." What would Mr. Harkins think I was doing at this end of the rope?

Mr. Ash: If I were in their position, I would make some inquiry after maybe a week or two to find out if the decisions had been entered.

The Court: I must say that while we all observe the formalities—we must observe the judicial po-

sition; otherwise we are always available to counsel to answer their questions and consider their problems. I cannot locate in the record motions that might have been considered as a reason for delaying the entering of the decisions.

Mr. Ash: I cannot understand it and I was astonished as could be when I first heard of this thing, which was just shortly before Mr. Heubusch of our office came down and looked through the file and said there is not a thing in the file since the entry of decisions, no motions or anything, and we just could not believe that that could happen, but it did.

The Court: The Calendar Section tells me that the decisions went by registered mail April 9. I guess they went by ordinary mail, not airmail, so it probably reached Los Angeles a week later.

All right, thank you for coming over. Just for that, I wanted to know whether that footnote was correct, if I understood the footnote properly.

Mr. Ray: May it please your Honor, the observation I made pursuant to the suggestions of co-counsel, Mr. Transue, on the Sam Katz case the other day, I have had occasion to adopt since then myself and in that case the issue of whether the Rules of Civil Procedure had application to the Tax Court was raised in the Second Circuit and that Circuit stated they had no application. I do not know to what extent it was briefed and argued before the Court of Appeals but the issue definitely was raised because the Tax Court dismissed that

case without making findings of fact on why a certain witness did not appear.

Also, I do want to call Your Honor's attention to the Realty Operators case, which I also cited for Your Honor's attention—it came out much later than the Buttgenbach case—and in that case the Fifth Circuit had no problem in throwing the Commissioner out of court where definitely, and I think according to the findings, the Tax Court neglected to serve until a few days before the statutory period had run. In that case, we filed a motion obviously for delaying and we were thrown out.

The Court: Thank you again very much for coming over. I hope I did not trouble you unduly. There is one other thing. I wanted to ask Mr. Ray this the other day and I almost forgot again.

As I understand it, Respondent does not object to the granting of the motion made to vacate the decisions, but takes the position that the Tax Court is powerless to act, isn't that it? Are you taking the lawful position?

Mr. Ray: No, unfortunately, Your Honor, we do object. Not only do we object on the ground that the Tax Court has no jurisdiction, but we do object because as a matter of policy where the Tax Court has no jurisdiction we cannot become a party to or have any part of granting a motion in circumstances where the Tax Court has no jurisdiction.

Mr. Ash: Mr. Ray, am I not right in my recollection—I realize it has no value—as a result of

our first conference with the officials in your office, that the position was stated that, of course as a matter of policy you had to object for the record because you did not want to set a precedent wherein people could come in and for one reason or other, through a hardship, try to eliminate any rule of finality. However, as I gathered, your office would not object very strenuously if relief were granted in this case.

Mr. Ray: Well, I think that probably you have correctly paraphrased the language of our Chief Counsel, but I, nevertheless, do believe that the statement that I just made to Her Honor is our position before this Court.

The Court: That is a statement of policy.

Mr. Ray: Our statement of policy is, as represented by the Chief Counsel under the circumstances of this case, as much as we regret the situation, we are obliged to persist before the Tax Court that they have no jurisdiction to entertain or grant this motion under the authority of the Swall Case and others.

The Court: As I say, I am using my discretion to entertain the motion. I granted the motion for leave to file the motion. I think that I should do that and we have a rule that touches on the point.

Mr. Ash?

Mr. Ash: When we filed our original motion, I fully realized that within your discretion you could, within your propriety, deny it and I would have no complaint and I greatly appreciate the fact that the

matter is getting all this consideration, my concern being largely for the Counsel in it who was so frightfully embarrassed by the situation and also of course for the taxpayer.

The Court: I think that this Court has been so modest, so economical, about its procedures. It has been so misunderstood in many ways. I was reading something about Congressman Dingell in the Congressional Record last night. I already started to do some work on this. The statements that are made by members of Congress about this Agency are most disheartening. Here is a little situation that probably is one of the most economical agencies in the Government there is. We do not even spend the money to have a formal decision printed. It looks like a court order. I think we need a suggestion box in the hall for counsel to drop their suggestions and I can understand that a secretary in an office who got a piece of thin flimsy carbon tissue, onionskin paper, size 8 by 11, could think that that was an unimportant document. We all in our offices are worrying—lawyers, judges, and people of any responsibility—are worrying all the time about our secretaries, and clerks, and people who may not have a certain awareness about things you are going to do.

Since this unfortunate thing has happened I think the Tax Court ought to print on bond paper as heavy as is used for printing a mandate something that said "Judgment under the issues," something of that kind, and attested by the Clerk of

the Court and then when you got it you would know it is a legal document.

Mr. Ash: I think that is an excellent suggestion.

The Court: I would be glad to have some one make that suggestion to the Chief Judge because I think it often means more, at least if the suggestion is coming from the outside, don't you know. It may mean the cost of a little printing bill, but it would be a good thing to make that suggestion.

Mr. Ash: I shall make that suggestion to the Committee on Tax Court Procedures of the American Bar Association, because I think it a good one. You take a situation like in this case. The decision with the interest means a liability in excess of $730,000. Well, very few District Courts handle cases of that magnitude and they come out with a formal decision.

The Court: Unless I happen to forget it, I am also at the beginning of the trial of a case I am going to ask to what office the papers are to be mailed. I did it yesterday. I had a trial attorney who was in a different office from the tax lawyer in the case and the man who tried the case was not to receive the papers. Another reason why it might be good for you to make a suggestion about that form of our decision is because I think you know that the judges of this Court always have been very reluctant to take unto themselves any glory of any kind, notwithstanding the gain. There is a little misunderstanding about that on the part of members of Congress. It has been my observation that

my colleagues are extremely modest and that they would hesitate to get out a document that had some large Roman print on it. They would be afraid that someone would say, "Oh, well, the next thing you will do will be to put red ribbons and gold seals on your paper." It is a serious matter and we ought to certainly do something about those decision forms.

Thank you again.

Mr. Ash: Thank you.

(Whereupon, at 1:55 p.m., the hearing was concluded.)

[Endorsed]: T.C.U.S. Filed Sept. 20, 1954.

[Title of Tax Court and Causes 26396, 26397.]

MOTION FOR LEAVE TO FILE AN AMENDMENT TO THE MOTION TO VACATE DECISIONS OUT OF TIME

Come now the above-named petitioners by their attorney, Robert Ash, and move the Court for leave to file an amendment to the motion to vacate decisions out of time.

The reason for this motion is to state the purpose of the motion to vacate the decisions. The purpose of the motion to vacate the decisions is to obtain a rehearing of the case on its merits. As can be seen from the statement of facts filed herein

good cause exists for vacating the decisions and granting a rehearing. A copy of the amendment is attached hereto.

/s/ ROBERT ASH,
Attorney for Petitioners

Served October 18, 1954.

[Endorsed]: Filed Oct. 11, 1954. Granted Oct. 15, 1954.

[Title of Tax Court and Causes 26396, 26397.]

AMENDMENT TO THE MOTION TO VACATE DECISIONS

Comes now petitioners, by their attorney, Robert Ash, and amend the motion to vacate decisions filed on August 24, 1954, as follows:

"Come now the above-named petitioners by their attorney, Robert Ash, and move the Court vacate the decisions entered herein on April 8, 1954, for the purpose of granting petitioners a rehearing of the case on its merits.

"The statement of facts and supporting affidavits in support of this motion are incorporated herein by reference."

/s/ ROBERT ASH,
Attorney of Petitioners

Served October 18, 1954.

[Endorsed]: T.C.U.S. Lodged October 11, 1954. Filed October 15, 1954.

[Title of Tax Court and Causes 26396, 26397.]

ORDER

For cause, as set forth in petitioners' amended motion lodged on October 11, 1954, and filed on October 15, 1954, and in the statement of facts in support of the amended motion, filed on October 11, 1954, it is

Ordered: That these proceedings be placed upon a special calendar in Washington, D. C., before Division 13, at 10:00 a.m. on January 17, 1955, for further hearing; and it is further

Ordered: That the decision in each proceeding which was entered on April 8, 1954, be vacated and set aside for the purpose of granting petitioners a further hearing on the merits.

Dated: Washington, D. C., December 13, 1954.

[Seal] /s/ MARION J. HARRON,
Judge

Served December 13, 1954.

[Title of Tax Court and Causes 26396, 26397.]

MOTION TO VACATE ORDER PURPORTING TO VACATE FINAL DECISIONS

Now Comes the Commissioner of Internal Revenue, by his attorney, R. P. Hertzog, Acting Chief Counsel, Internal Revenue Service, and moves the Court to vacate its order entered in these proceed-

ings on December 13, 1954, in which it purports to vacate the final decisions entered on April 8, 1954, and grants the petitioners a further hearing on the merits at 10:00 a.m. on January 17, 1955, despite the fact that the record discloses no adequate reason to support such action.

As grounds for this motion, respondent respectfully shows the Court that its decisions entered on April 8, 1954, became final within the purview of Section 1140(a), Internal Revenue Code of 1939, on July 8, 1954, and it now has no jurisdiction to take any further action in these proceedings. The Court, being powerless to act, should not have granted petitioners' motion to vacate the decisions out of time which was filed by them on October 15, 1954, but should have dismissed the motion for want of jurisdiction. Arthur Swall vs. Commissioner, (CCA-9, 1941) 122 F.2d 324, cert. denied 314 U.S. 697, 27 A.F.T.R. 845. Also see Commissioner vs. Realty Operators, Inc., (CCA-5, 1941) 118 F.2d 286, 26 A.F.T.R. 680; Maude W. Sweet, et al., vs. Commissioner (CCA-1, 1941) 120 F.2d 77, 27 A.F.T.R. 362; Denholm & McKay Company vs. Commissioner, (CCA-1, 1942) 132 F.2d 243, 30 A.F.T.R. 572; Emmett J. McCarthy vs. Commissioner, (CCA-7, 1943) 139 F.2d 20, 31 A.F.T.R. 975; Hugh B. Monjar vs. Commissioner (CAA-2, 1944) 140 F.2d 263, 32 A.F.T.R. 30; Trust U/W of Carl Hicks White, Deceased, et al., vs. Commissioner, (CCA-3, 1941) 142 F.2d 746, 32 A.F.T.R. 732; R. Simpson & Co., Inc. vs. Commissioner, 321 U.S. 225, 31 A.F.T.R. 966:

Commissioner vs. Northern Coal Co., 293 U.S. 191, 14 A.F.T.R. 667.

Wherefore, this motion should be granted.

/s/ R. P. HERTZOG,
Acting Chief Counsel, Internal Revenue Service

Of Counsel:
R. H. Transue, Special Attorney, Internal Revenue Service.

Served December 22, 1954.

Acknowledgment of Service attached.

[Endorsed]: T.C.U.S. Filed December 16, 1954. Denied December 21, 1954.

[Title of Tax Court and Causes 26396, 26397.]

MOTION FOR REVIEW BY ENTIRE COURT OF ORDER PURPORTING TO VACATE FINAL DECISIONS

[Printer's Note: The following motion is a duplicate of Motion set out in full at pages 135 to 137 of this printed record.]

Served December 17, 1954.

[Endorsed]: T.C.U.S. Filed December 16, 1954. Denied December 16, 1954.

The Tax Court of the United States
Washington

Docket No. 26397

JESSE L. LASKY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

ORDER AND DECISION

The petitioner filed a motion to vacate the decision entered in this proceeding and for rehearing on the merits. Hearing was held on the motion. The Court concluded that there existed extraordinary circumstances and good cause for granting extraordinary relief, namely, (1) further hearing on the merits to enable the petitioner to present new and additional evidence; and (2) reconsideration by the Court of the issue presented to determine whether the Court made any erroneous conclusion of fact or law in its original findings of fact and conclusions of law. LaFloridienne J. Buttgenbach & Co. vs. Commissioner, 63 F.2d 630; United States vs. Morgan, 346 U.S. 502; United States vs. Mayer, 235 U.S. 55; Wayne United Gas Co. vs. Owens-Illinois Glass Co., 300 U.S. 131; Rule 60(b), Federal Rules of Civil Procedure; Reo Motors, Inc. vs. Commissioner, 219 F.2d 610. In order to reconsider the issue in this proceeding on the merits and to receive further and additional evidence, the Court vacated its decision entered on April 8, 1954, re-

ceived further and additional evidence at a rehearing, and reconsidered the issue on the merits.

The petitioner diligently and seasonably filed his motion for rehearing and reconsideration on the merits. This Court is continuously in session; it is not in session for a term or terms. The petitioner's motion was not filed, therefore, after a "term" of this Court had expired during which the original decision was entered.

The Court has reviewed the entire record in this proceeding, the original evidence and the additional evidence adduced at the further hearing. The parties filed supplemental briefs after the further hearing. The Court has given consideration to the arguments of the parties in their supplemental briefs and has reviewed the cited authorities. Supplemental Findings of Fact are made which are set forth in a Memorandum Sur Order which is attached hereto.

At the further hearing, the testimony of the accountant for Jesse L. Lasky, the petitioner in Docket No. 26397, which is consolidated with Bessie Lasky, Docket No. 26396, was taken for the first time. Also received was the testimony of the individual who was, in 1942, the executive vice-president of United Artists in charge of world-wide distribution of pictures, and who had been, prior to October 1941, president of a subsidiary of Warner Brothers which distributed Warner Brothers pictures. He had been the distributor of the picture, Sergeant York, for Warner Brothers. And the testimony of the president of United Artists in 1942 was

taken. Additional testimony of Jesse L. Lasky was received.

The Court is not persuaded by the additional evidence at the further hearing that it erred in its original Findings of Fact and Conclusions of Law. For example, the additional evidence does not, in our opinion, establish that, 1942, any real dispute between Lasky and Warner Brothers existed. The additional evidence establishes that no audit was ever made of Warner Brothers accounting records of the receipts, and of Lasky's share thereof, from the picture Sergeant York. The additional evidence establishes that the then president of United Artists gave consideration to the possibility of making a resale of Lasky's interest in the picture Sergeant York before he concluded the contract of purchase with Lasky, and that before he concluded the contract he contacted an officer of Warner Brothers and told him that he had an opportunity to purchase Lasky's interest and inquired whether Warner Brothers would be interested in purchasing from United Artists the 25 per cent interest which United Artists contemplated purchasing from Lasky. The additional evidence, in our opinion, gives further support to the conclusions this Court has reached, previously. The Court concludes that the transaction of United Artists with Lasky, and the transaction of United Artists with Warner Brothers shortly thereafter, must be considered together, and that although Lasky may not have been aware of all of the discussions and considerations of his chief agent, his attorney, nevertheless, his

agent's actions must be imputed to Lasky. It is concluded that Lasky sold his accrued earnings in the picture Sergeant York, which amounted to $822,857.56, to United Artists at a "discount" of over $17,000, and that United Artists collected from Warner Brothers, Lasky's share of the accrued earnings to the extent of $820,000, thereby bringing about Warner Brothers' acquisition of the 25 per cent interest of Lasky for no more than the accrued earnings of the 25 per cent interest. We are unable to find in the entire transaction a sale by Lasky of a capital asset and a capital "gain" to Lasky of $805,000. It is, therefore,

Ordered and Decided: That there is a deficiency in income tax for the year 1943, in the amount of $224,515.14.

[Seal] /s/ MARION J. HARRON,
Judge

Entered: June 30, 1955.

MEMORANDUM SUR ORDER AND DECISION

Harron, Judge: Upon the additional evidence introduced at a further hearing in these proceedings, the following additional facts are found:

(1) Gradwell Sears was president of Vitagraph Corporation prior to October 1941, which was a subsidiary of Warner Brothers, which provided the film distributing facilities of Warner Brothers. He

had complete charge of the distribution of the picture Sergeant York in the United States and its possessions. In October 1941, he left Vitagraph and became executive vice-president of United Artists in charge of worldwide distribution. He held that office during 1942. In 1941 and 1942, Edward C. Raftery was president of United Artists. Sears knew that Lasky had a minority interest in Sergeant York, and that the picture was successful. He recalls that an executive of Warner Brothers lamented the fact that Warner Brothers did not own the entire interest in Sergeant York, and he "knew from advance information that Warner Brothers would very gladly acquire the entire rights in this thing [Sergeant York] if they became available." He did not ever talk to Lasky in regard to purchasing Lasky's interest in Sergeant York. He recommended that Raftery discuss the possibility of acquiring Lasky's interest with Lasky's attorney.

(2) Before December 4, 1942, a representative of Lasky visited Warner Brothers' office and obtained some figures which he communicated to Lasky's accountant, James D. Miller, who carried on his accounting practice in New York City. Miller believed, before December 4, 1942, that under Warner Brothers' accounting, more than $805,000 was due Lacky as his share of the receipts of Sergeant York. In October 1942, Miller believed that the picture Sergeant York "had been pretty well exploited domestically"; that there would still be, perhaps, some foreign exploitation; that in all probability there would be a release of restricted funds abroad;

and that there would be subsequent runs of the picture.

(3) In 1942, Lasky's attorney was secretary of United Artists.

(4) Lasky did not know, on December 4, 1942, or before, that United Artists might resell Lasky's interest in Sergeant York to Warner Brothers. Lasky did not advise Warner Brothers that he was going to sell his interest in Sergeant York to United Artists. He never offered his interest for sale to Warner Brothers. Lasky knew that his attorney was negotiating for the sale of his interest in Sergeant York. His attorney was his agent and he left all the details in his attorney's hands.

(5) Lasky's attorney approached Raftery in November 1942, and asked him if United Artists would be interested in purchasing Lasky's interest in Sergeant York. Lasky had authorized his attorney to look for a buyer of his interest. Raftery consulted Sears about the offer of Lasky's attorney to sell Lasky's interest in Sergeant York and about the alternative of making a resale of Lasky's interest so as to make a little profit during 1942. Raftery also, before December 4, 1942, spoke to an officer of Warner Brothers, told him that he had an opportunity to buy Lasky's interest in the picture in question, and inquired whether Warner Brothers would be interested in purchasing Lasky's interest if United Artists decided not to keep it. The officer of Warner Brothers to whom Raftery spoke expressed the view that if United Artists bought Lasky's interest, Warner Brothers would like to

negotiate with United Artists relative to purchasing Lasky's interest from United Artists. Raftery expressed his desire to make a profit on a resale of Lasky's interest. Raftery did not deal with Lasky. He dealt only with Lasky's attorney. At the time Raftery entered into the contract of December 4, 1942 to purchase Lasky's interest he knew that Lasky was entitled to some distributions of earnings of the picture in question. He had some idea of the amount of the accrued earnings due Lasky. At the time Raftery considered purchasing Lasky's interest, he knew that the picture Sergeant York was not in full distribution; the "big cream" of the distribution had been taken off with the "pre-release" of the picture. He knew that as a picture progresses in distribution, diminishing returns set in and the returns decrease each month, and that at the time United Artists acquired Lasky's interest in Sergeant York, it was in the phase of declining distribution. Raftery's mind was made up from the start that United Artists would resell Lasky's interest in Sergeant York, and before he agreed with Lasky's attorney to purchase Lasky's interest he found out that he could get a purchaser and resell Lasky's interest. He intended making a short profit on a resale of Lasky's interest.

[Order and Decision in Case No. 26396 is the same as 25397 except for the following paragraph:]

Ordered and Decided: That there is a deficiency

in income tax for the year 1943, in the amount of $224,722.55.

[Seal] /s/ MARION J. HARRON,
Judge

Entered: June 30, 1955.

In the United States Court of Appeals
for the Ninth Circuit

Tax Court Docket No. 26397

JESSE L. LASKY, Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

PETITION FOR REVIEW

Now comes Jesse L. Lasky, Petitioner on Review herein, by his attorney, Robert Ash, and respectfully shows:

I. Jurisdiction

The Petitioner on Review is Jesse L. Lasky, an individual, whose address is 235 North Saltair Avenue, West Los Angeles, California. Petitioner on Review filed a Federal income tax return for the taxable year 1943 with the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California, which is within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, wherein this review is sought.

Respondent on Review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue, appointed and holding his office by virtue of the laws of the United States. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code of 1939 and Sections 7482 and 7483 of the Internal Revenue Code of 1954.

II. Prior Proceedings

On November 28, 1949, the Commissioner of Internal Revenue sent to the taxpayer, by registered mail, a notice of deficiency in which he determined that the taxpayer owed a deficiency in income tax for the taxable year 1943 in the amount of $224,515.14.

Thereafter, the taxpayer duly filed an appeal from said determination with the Tax Court of the United States. The case was tried before the Honorable Marion J. Harron, Judge of the Tax Court of the United States, on December 10 and 11, 1951, in Los Angeles, California. On April 8, 1954, the Tax Court promulgated its Findings of Fact and Opinion written by Judge Harron and entered its decision, ordering and deciding that the taxpayer owed a deficiency in income tax for the taxable year 1943 in the amount of $224,515.14.

Thereafter, on August 24, 1954, petitioner filed a motion for leave to file a motion to vacate the decision out of time and a motion to vacate decision entered on April 8, 1954. On December 13, 1954, the

Tax Court of the United States entered an order vacating and setting aside the decision of April 8, 1954, and granted petitioner a further hearing on the merits. Thereafter, a rehearing of the case was held in Washington, D. C., on January 21 and 26, 1955. On June 30, 1955, the Tax Court entered a memorandum sur order and decision and order and decision, again ordering and deciding upon the rehearing and reconsideration of the issue on the merits that the taxpayer owed a deficiency in income tax for the taxable year 1943 in the amount of $224,515.14.

Petitioner on Review petitions the United States Court of Appeals for the Ninth Circuit to review the order and decision entered by the Tax Court of the United States on June 30, 1955, wherein and whereby it was ordered and decided that there is a deficiency in income tax for the year 1943 in the amount of $224,515.14.

III. Nature of the Controversy

Petitioner Jesse L. Lasky and his wife, Bessie Lasky, each filed separate income tax returns on a cash basis for the years 1942 and 1943. The income was reported as community income.

On March 23, 1940, petitioner Jesse L. Lasky acquired from Sergeant Alvin C. York the exclusive motion-picture, radio, television and dramatic rights to the life story of York. Thereafter, on May 15, 1940, Jesse L. Lasky conveyed all his rights, title and interest under the contract of March 23, 1940,

with Sergeant York to Warner Bros. In consideration for all of his rights, title and interest under the contract of March 23, 1940, Warner Bros. agreed to pay Jesse L. Lasky $40,000, plus a certain percentage of the gross film rentals or sales realized from the distribution of the photoplay. In addition, by a separate and distinct contract, Warner Bros. employed Jesse L. Lasky as a co-producer for purposes of producing the play based upon the life of Sergeant York. After the picture "Sergeant York" was released, a dispute and dissatisfaction existed between Jesse L. Lasky and Warner Bros. Petitioner was dissatisfied with the way Warner Bros. was distributing the picture. He was also dissatisfied with the receipts that were tendered him from the distribution of the picture. After consulting his attorney, certain checks tendered Jesse L. Lasky by Warner Bros., as his share of the film rentals, were returned to Warner Bros. Jesse L. Lasky wished to avoid a dispute with Warner Bros. and decided to sell his rights under the contract of May 15, 1940, with Warner Bros. Accordingly, on December 4, 1942, he sold his rights under the contract of May 15, 1940, to United Artists Corporation for $805,000. Petitioner Jesse L. Lasky reported his share of the gain on this sale as the gain from the sale of a capital asset. The Commissioner of Internal Revenue and the Tax Court held that the gain resulting from the sale was taxable as ordinary income. The question presented by this appeal is whether the sum of $805,000, which Jesse L. Lasky received from the sale of certain contractual rights

to United Artists Corporation on December 4, 1942, is taxable as ordinary income or as capital gain.

/s/ ROBERT ASH,
Attorney for Petitioner on Review

[Endorsed]: T.C.U.S. Filed August 10, 1955.

The Tax Court of the United States
Washington

[Title of Causes No. 26396, 26397.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of The United States do hereby certify that the foregoing documents, 1 to 37, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designation of Contents of Record on Review, Designation of Additional Portions of Record and Supplemental Designation of Additional Portions of Record", including all original exhibits, 1-A, 2 through 6 and 7-B, attached to the stipulation of facts, petitioners' exhibits 8 through 11 and respondent's exhibits C through CC, admitted in evidence, in the proceedings before The Tax Court of the United States entitled: "Bessie Lasky, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 26396," and "Jesse L. Lasky, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 26397" in which the petitioners in The Tax Court proceedings have initiated appeals as above

numbered and entitled, together with a true copy of the docket entries in said Tax Court proceedings, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of The United States, at Washington, in the District of Columbia, this 1st day of September, 1955.

[Seal] /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the
United States

The Tax Court of the United States

Docket Nos. 26396, 26397

BESSIE LASKY-JESSE L. LASKY,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS

Circuit Court of Appeals Courtroom, 16th Floor, United States Post Office and Court House Building, Los Angeles, California, December 10, 1951—4:25 p.m.

(Met pursuant to notice.)

Before: Honorable Marion J. Harron, Judge.

Appearances: Harrison Harkins, 650 S. Spring St., Los Angeles 14, Calif., and Herschel B. Green

and Loyd Wright, 111 W. Seventh St., Los Angeles 14, Calif., appearing for the Petitioners. W. Lee McLane, Jr., (Honorable Charles Oliphant, Chief Counsel, Bureau of Internal Revenue), appearing for the Respondent. [1*]

The Court: Please state your appearances, gentlemen.

Mr. Harkins: Harrison Harkins and Herschel B. Green for the Petitioners.

Mr. McLane: W. Lee McLane, Jr., for the Respondent.

Mr. Harkins: Your Honor, I would like to make a written motion for consolidation.

The Court: The motion is granted. Hand it to the Clerk.

Mr. Harkins: Your Honor, based on the notice of efficiency and the pleadings, the question presented is whether capital gain or ordinary income resulted from a transaction in 1942 whereby Jesse L. Lasky, for a consideration of $805,000, granted and consigned to United Artists Corporation his contractual rights under certain agreements with Warner Brothers Pictures, Inc. The entire consideration of $805,000.00 represents a gain, and the question is whether it is capital gain or ordinary income in 1942.

Now, the evidence will show that on March 23, 1940, Lasky obtained from Sergeant Alvin C. York, one of the outstanding heroes of World War I, the exclusive motion picture, radio, television, and dra-

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* Page numbers appearing at top of page of original Reporter's Transcript of Record.

matic rights to the life story of York. The contract between Lasky and York is reproduced as Exhibit 1-A of the stipulation of facts to be submitted.

In May of 1940 Lasky entered into two contracts [3] with Warner Brothers Pictures, Inc., both of which contracts bear the date of May 15, 1940. The contracts are reproduced as Exhibits 2 and 3 of the stipulation of facts.

Under the first agreement dated May 15, 1940, Lasky granted and assigned to Warners all of his right, title, and interest in the March 23, 1940, contract between Lasky and York for a consideration of $40,000.00 plus Warners' assumption of Lasky's obligations under the York contract.

Under the second or supplemental agreement, dated May 15, 1940, Warner Brothers agreed to pay Lasky an additional consideration for the assignment of the York contract in the form of a percentage participation in the gross receipts from the distribution of a motion picture to be made from the York story.

That is to say, Warner Brothers agreed to pay Lasky 20 per cent of the gross domestic proceeds in excess of $1,600,000.00, 20 per cent of the gross foreign proceeds in excess of $150,000.00.

It was further agreed that Lasky was to receive 25 per cent instead of 20 per cent of the aggregate gross proceeds in excess of $2,500,000.00.

Warner Brothers produced the motion picture "Sergeant York" from the York story and released it for distribution in July of 1941. The picture was a great financial success. [4]

On December 30 and December 31, 1941, Lasky and Warner Brothers entered into letter agreements amending the supplemental agreement dated May 15, 1940. These letter agreements are reproduced as Exhibits 4 and 5 of the stipulation of facts.

Under these letter agreements, in consideration of $175,000.00, Lasky agreed to raise from $1,600,000.00 to $2,580,000.00 the point at which he should be entitled to share in the gross proceeds from domestic distribution. Lasky further agreed to treat as an advance the sum of $21,216.80 which Warner Brothers had paid him in 1941.

In another letter agreement, dated April 30, 1942, Lasky agreed that Warner Brothers could withhold $18,998.00 from his share to be applied on an advertising expenditure in connection with the picture. This letter agreement is reproduced as Exhibit 6 of the stipulation of facts.

Now, on December 4, 1942, Lasky and United Artists Corporation entered into the contract of sale which is reproduced as Exhibit 7-B of the stipulation of facts. Under this contract, in consideration of $805,000.00, paid by United Artists, Lasky granted and assigned to United Artists all rights of every kind which had been granted to him under his amended contracts with Warner Brothers Pictures, and all other rights he might have with respect to the picture "Sergeant York" or in the story on which it was based. [5]

This is the transaction which is at issue in these proceedings.

We believe the evidence will show that this was the first time in Lasky's career that he had acquired in his own right and sold a literary property for picture purposes, and that this was the first and only time in his career that he sold a right to participate in the proceeds of a motion picture.

Under this statement of exhibits and evidence it is our contention that the transaction with United Artists was a sale of a capital asset and was correctly reported by Lasky as a capital gain.

Now, that, briefly, your Honor, is the Petitioner's case, and we rest.

The Court: Mr. McLane.

Mr. McLane: May it please the Court, Respondent has determined a deficiency of $224,516.14 in Petitioner Jesse L. Lasky's income tax for the year 1942, and a deficiency of $224,722.55 in Petitioner Bessie Lasky's income tax for the year 1942. Both deficiencies arise from the same transaction. The legal question presented is whether $805,000.00 received by Jesse Lasky from United Artists on December 4, 1942, for his contractual interest in the earnings and profits of the motion picture "Sergeant York" is taxable as ordinary income or as a capital gain. [6]

As might be expected, Respondent viewed the factual background with a different set of perspectives than Mr. Lasky, and the result was the statutory notices of deficiency, claiming that the $805,000.00 was ordinary income. The divergence of factual analysis and consequent legal result is as follows:

When Mr. Lasky "sold" his rights to the story of Sergeant York to Warner Brothers, he retained only the right to participate in the earnings and profits of the motion picture "Sergeant York." This was all he could transfer to United Artists on December 4, 1942. Therefore, it is necessary to inquire into the character of the right held by Mr. Lasky. Respondent contends that the amounts to be paid Mr. Lasky by Warner Brothers from the earnings of "Sergeant York" constituted ordinary income when received by Lasky, and the reasons for such a position are:

1. Mr. Lasky had not held the rights to the life story of Alvin York for the required holding period and hence any payments for said rights, whether in cash or from the earnings of the motion picture, "Sergeant York," had to be ordinary income.

2. A capital gain arises only from the sale or exchange of a capital asset. Since Section 117(a)(1) excludes from the definition of a capital asset "property held by the taxpayer primarily for sale to customers in the [71 ordinary course of his trade or business," it is Respondent's contention that the sale of the life story of Sergeant York to Warner Brothers by Jesse Lasky was not the sale of a capital asset, because Mr. Lasky was in the trade or business or selling motion pictures stories as a producers.

3. Warner Brothers did not obtain all the rights to the property sold by York to Lasky and thus it was merely a licensee, paying royalties to Mr. Lasky which constituted ordinary income.

4. The portion of earnings from the picture, "Sergeant York," to which Mr. Lasky was entitled was additional or incentive compensation for his personal services as a producer of the motion picture "Sergeant York."

Consequently, since the income which Mr. Lasky was entitled to receive from the picture's profits was ordinary income when received by him, he cannot change its nature by realizing it through the form of an assignment or sale. It remains ordinary income to Lasky, regardless of the form utilized to realize it.

However, if the Court should hold that an individual can convert ordinary income into capital gains income by selling or assigning his right to receive the ordinary income, then there is a further reason why this particular transaction between Lasky and United Artists should not be considered to fall within the provisions of Section 117. Respondent denies [8] that the arrangement between United Artists and Mr. Lasky constituted a sale, but rather gives all the appearances of being a three-way transaction between Lasky, Warner Brothers and United Artists for the purpose of permitting Mr. Lasky to discount to Warner Brothers the earnings due him in order that he might go through the form of a capital gain transaction.

Respondent further contends that even if the Court should reject any contention made thus far, Mr. Lasky would still be entitled to a far smaller capital gain than $805,000.00 for the reason that he was in constructive receipt of $591,915.42 in 1942

prior to December 4, 1942, when he entered into the agreement with United Artists, thus leaving a balance of only $213,084.58. Now, sir, Respondent contends that the sum of $46,376.80 expended by Mr. Lasky for legal fees relating to this transaction should be charged against the capital gain rather than taken as a deduction from ordinary income during 1942. Thus, the amount subject to the capital gains rate would be $166,707.78.

Just one further point, your Honor. It should be noted that in the stipulation on page 3 that Respondent has not admitted those purported contracts were entered into on those dates.

This then reflects the major positions maintained by Respondent. Counsel for Respondent will endeavor to [9] develop evidence through the use of documents and testimony which will sustain Respondent's position.

The Court: You may file your stipulation.

The stipulation is received and made a part of the record and will be marked as an exhibit in this proceeding.

I am sorry you had to wait with your witnesses.

Whereupon,

JESSE L. LASKY

called as a witness for and on behalf of the Petitioner,having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address for the record, please.

The Witness: Jesse L. Lasky, 235 North Shore Air Avenue, West Los Angeles.

(Testimony of Jesse L. Lasky.)

Mr. Harkins: Your Honor, I have here a document which purports to be the 90-day letter dated November 28, 1949, from George D. Martin, the revenue agent in charge, and I ask that this be marked Petitioner's 1.

The Clerk: Exhibit 8 for identification.

(The document above referred to was marked Petitioner's Exhibit No. 8 for identification.)

Direct Examination

Q. (By Mr. Harkins): Mr. Lasky, I show you Petitioner's Exhibit 8 for identification and ask you: Did you receive this document? [10]

A. I did.

Q. And I call your attention to the statement form attached. Was that attached to it when you received it? A. It was, yes.

Mr. Harkins: Your Honor, I offer this in evidence.

The Court: Received.

(The document heretofore marked Petitioner's Exhibit No. 8 was received in evidence.)

Q. (By Mr. Harkins): Mr. Lasky, what is your occupation?

A. I am a motion picture producer.

Q. When did you first become connected with the motion picture industry?

A. In 1913 I came to California and produced the first feature, "The Squaw Man," starring Justin Farnam in 1913.

Q. Did you have a company then?

(Testimony of Jesse L. Lasky.)

A. The company was called Jesse L. Lasky Star Player Company.

Q. Was that a corporation?

A. That was a corporation, and I was president.

Q. For how long a period were you associated with the Jesse L. Lasky Star Player Company?

A. In 1916 it merged with Famous Players Corporation, and was known as Famous Players-Lasky, but at that time I was [11] first vice-president in charge of production.

Q. Was this Famous Players-Lasky the forerunner or predecessor of the present Paramount?

A. It is the same company.

Q. It changed its name?

A. It is Paramount Famous-Lasky, Paramount Publications, and signs "Paramount Corporation."

Q. You state you are vice-president in charge of production for that organization? A. Yes, sir.

Q. How long did your connection with it last?

A. Until 1932.

Q. Now, after you left that organization, what did you do?

A. I joined the Fox Film Corporation as a producer. I was there for three years, during which I produced 18 pictures.

Q. You say three years. That is approximately September of 1935 to December of 1938?

A. Yes, I think that that is about it.

Q. After leaving the Fox Film Corporation what did you do?

A. I formed a corporation with Mary Pickford,

(Testimony of Jesse L. Lasky.)

known as Pickford-Lasky Corporation, and I produced two pictures there.

Q. What was the nature of your employment with Pickford-Lasky? [12]

A. I was producer and did the actual production of pictures and was also—I think the president of the company.

Q. How long did your association with Pickford-Lasky Company last? A. About a year.

Q. Then after leaving Pickford-Lasky Company, what did you do?

A. I became a producer at RKO Corporation. Your Honor, I made a list of these dates. Could I correct——

The Court: You may refer to them.

The Witness: That is right. RKO from 1936 to March 1938.

Q. (By Mr. Harkins): And you stated you were a producer there.

A. Yes, I was a producer there.

Q. Now, after March 1938 what was your next employment?

A. Well, then I organized a radio show called "Gateway to Hollywood." The purpose of the show was to find new, young talent for the motion picture industry.

Q. You organized it? A. Yes.

Q. Did you have any function in the program itself?

A. Yes, I acted as master of ceremonies and also passed on all the talent that we discovered. [13]

(Testimony of Jesse L. Lasky.)

Q. How long did that association last?

A. That lasted until March of 1940.

Q. What was your next association?

A. It was at that time that—you see, I was for those months actually out of the picture business as producer. I was in radio. I wanted to go back in the picture business, and I conceived the idea of Sergeant York. I went to Tennessee and made several trips and finally persuaded him to sell me his life story, which he did. After I acquired the story, I shopped around to sell it and produce it. I found considerable opposition because at that time the country was pacifistic and the producers said, "This is a war story."

I, having thoroughly studied the subject, decided that it was a story of a wonderful, simple mountaineer, who eventually went to war, but it was the story of a man and not a war story.

The results, at any rate—after some negotiations with different companies my quest took me to Warner Brothers and there I met Harry Warner. Against everyone else's judgment, I said that this story was not a war story but it would be a fine and patriotic thing to show in this stage of history the actual history of Sergeant York. It is an extraordinary history. May I tell you just one incident that to me was very important?

He, as a young man, went across from Tennessee to [14] Kentucky, and he would drink and was quite a fighter. One day he had a very serious fight and his opponent was hurt, and he persuaded him

(Testimony of Jesse L. Lasky.)

to go into the church. The pastor of the church taught above everything else, "Thou shalt not kill." Sergeant York took this to heart and gave up drinking and became a true pacifist, this very rugged mountaineer.

At this time war broke out and he was drafted, and the man who had drafted him in his county was the pastor who taught him, "Thou shalt not kill."

The pastor had a hard time explaining to the simple Sergeant York that there are reasons when it becomes necessary to kill when your country needs defending, but actually he didn't convince him, but he was compelled to go to camp.

In camp he did his duty as a soldier, and as a soldier he was very efficient. He was the best shot in his regiment. He was a marksman, and this great shot still had all the earmarks of a pacifist. The minister took him into his tent one day and explained to him at great length that in time of war, he said, "If your house is invaded by a common enemy and your family is in danger, sergeant, what would you do?"

Well, the sergeant was puzzled and thought he would protect his family and said, "Well"—I am making this very brief—"that is about the situation. Our country finds itself in a war, and what we want you to do is to fight to protect your country [15] from invasion."

The sergeant was not convinced, and they gave him a two-weeks leave to make his mind up, and

(Testimony of Jesse L. Lasky.)

when he got time to think it over, if he couldn't convince himself to return and fight, he would be given another line of duty.

He went back to his home, and on the last day of the two weeks he was still very much worried with his conscience. He went up on the mountain with his dog and he sat there all night. The next morning he opened his Bible—I got all this right from his associates. In the morning at daylight it was windy, and the leaves of the Bible blew open, and after he could see in the daylight the page rested on this: "Render unto Caesar the things that are Caesar's, and render unto God the things that are God's." With that thought in his mind, he thought he had his answer from his God, and he went back to camp and was a very efficient soldier.

And when he went overseas he had an opportunity to capture a number of Germans—I think it was 300—single-handed, personally, and brought them in safely back to his lines, for which he received every decoration that we could give him, the Congressional Medal, and most of our allies decorated him with allies' medals. And, of course, he was received in the United States as the greatest hero of World War I.

It seemed to me that that was a story that was very [16] timely.

And I persuaded Mr. Harry Warner, who was not too active in the production line, I told him the story with much more detail. He called up Mr. Jack Warner, head of production, and he said,

(Testimony of Jesse L. Lasky.)

"Jack, I want you to see Mr. Lasky. I would like our company to make a picture of Sergeant York."

I saw Jack Warner, and after some negotiations, the various contracts that we have here were signed, and I produced the picture with—in association with them and with help, and so forth.

Q. Mr. Lasky, you stated that you acquired the story of Sergeant York, and we have stipulated that you signed the contract to that effect. Where did you get the money to pay for the acquisition of the story?

A. Well, the "Gateway to Hollywood" was not too successful. In fact, from 1932 I wasn't very prosperous, and in the end I borrowed $25,000.00, which was my first payment to Sergeant York.

Q. When you acquired the rights to the Sergeant York story, what did you do? Did you go directly to Warner Brothers?

A. No. I first went to Paramount, because that was the company that I had actually helped to found, but they wouldn't have anything to do with a war story. Then I went to Sam Goldwyn, and he read it and was rather keen about it, but he [17] said, "It is the wrong time to do a war story."

In fact, I talked to several agents. I finally called up a friend—well, he was head of Warner Brothers' exploitation—Charley Irevale, exploitation executive. He said, "You go see Harry Warner. He is a very patriotic man. I think he might be interested in your Sergeant York. Don't see Jack."

(Testimony of Jesse L. Lasky.)

Well, as I said, I saw Harry and he referred me to Jack.

Q. Had you ever bought a literary property before, Mr. Lasky?

A. No, never. In my days as vice-president of Paramount, many, many properties, hundreds, passed through our hands.

Q. You stated that your first association in the motion picture business was with Jesse L. Lasky Star Players Company as a producer. How did that company acquire its production?

A. Well, the company would purchase its plays, stories, the same as it purchased anything else.

Q. Using whose money?

A. The company's money, the corporation's money.

Q. Was that similar with Famous Players-Lasky Company? A. Yes, until I resigned.

Q. Then Sergeant York's literary property was the [18] first you had acquired?

A. No question about that.

Q. You stated you sold that property to Warner Brothers Pictures, and we have stipulated some agreements with respect to that.

Mr. Harkins: Counsel, would you want to verify this? I have in my hand a photostatic copy of an agreement which purports to be between Jesse L. Lasky and Warner Brothers, dated May 15, 1940, which is the photostat of the original of the document which is produced as Exhibit 2 of the stipulation.

(Testimony of Jesse L. Lasky.)

Mr. McLane: I will stipulate that that is the photostat.

Q. (By Mr. Harkins): Mr. Lasky, do you recognize your signature? A. Yes, I do.

Q. Did you sign this document? Do you recall what date, on or about what date?

A. I imagine——

Q. May of 1950? A. Yes.

Q. Would you state that in the record?

A. Yes. I signed it May of 1950.

Q. 1950 or—— A. 1940. [19]

Q. I have here a signed copy of a document entitled "Supplemental Agreement," which is dated May 15, 1940, and which purports to be between Warner Brothers Pictures, Inc., and Jesse L. Lasky, and which is the signed original of the document which was reproduced as Exhibit No. 3 of the stipulation in advance.

Mr. Harkins: Counsel, do you wish to see this?

Mr. McLane: No.

Q. (By Mr. Harkins): Mr. Lasky, is that your signature on there?

A. That is my signature.

The Court: We have the exhibits. The Clerk has the exhibits, and if they conform to our exhibits, show the exhibits that are in evidence to the witness, Mr. Lasky, and tell him you are showing him Exhibit 4 or 5, instead of using those copies.

Mr. Harkins: The result is the rather peculiar procedure, because Paragraph 7 of the stipulation——

(Testimony of Jesse L. Lasky.)

The Court: We don't need to go over that again.

Q. (By Mr. Harkins): Mr. Lasky, do you recall about what time you signed this agreement you identified? A. May 15, 1940.

Q. The two agreements you have just identified relate to the sale to Warner Brothers of the rights in the Sergeant [20] York story? Did you enter into any other agreements with Warner Brothers with respect to that subject matter?

A. Yes. They gave me an assignment to produce the picture.

Q. About what time was that agreement?

A. That will be about that time.

Mr. Harkins: That is all, your Honor—oh, no. There is one more question.

Q. (By Mr. Harkins): Mr. Lasky, we have stipulated that under date of December 4, 1942, you rendered an assignment to United Artists Corporation of your rights in the agreements with Warner Brothers? A. That is correct.

Q. How do you characterize the contract you had with Warner Brothers? Is that a participation contract? A. Well, a participation contract.

Q. Had you ever sold or have you since sold or assigned a participation contract to a motion picture?

A. No, I never sold one before. I recently sold the story that I acquired from an independent producer. I couldn't produce it, "The Great Caruso."

Q. What date was that?

A. About a year ago. Maybe two years ago.

(Testimony of Jesse L. Lasky.)

Mr. Harkins: That is all. [21]

The Court: Any cross examination?

Mr. McLane: I would like to offer in evidence something out of evidence, the income tax return of 1942 of Mr. Lasky's.

Mr. Harkins: No objection.

The Court: It will be received in evidence, respondent's exhibit.

The Clerk: Exhibit C.

(The document above referred to was received in evidence and marked Respondent's Exhibit C.)

Cross Examination

Q. (By Mr. McLane): Mr. Lasky, if I ask any questions that are objected to by Mr. Harkins, I wish you would wait until the Court has time to rule.

When did you arrive in Los Angeles after signing the contract with Alvin York on March 23, 1940?

A. Well, I came right back from—it is hard to remember. I made three trips to Tennessee, and the contracts, I think, were signed in Tennessee, and I brought them back. It was on a Sunday, I remember that, and I think——

Q. Did you fly back? A. Yes.

Q. What about March 24 or 25 or 26? Would that be close enough? [22]

A. I naturally don't remember.

Q. Well, we will help you out a little bit later on. A. Yes.

(Testimony of Jesse L. Lasky.)

Q. Why did you sell the right to participate in the rights to Sergeant York to United Artists?

A. I think I can answer that. It started—when the picture was released, I think in July 1940, it was an immediate success. A rumor was about that it was going to do quite a large gross business, and also brother producers and others came to me, and some wanted to do accounting and others stated that I had better watch our accounting. So, I sent for one James Miller, an expert accountant, who specialized in motion picture accounting. He had done similar work when I was at Fox Company in 1933, 1934 and 1935.

He uncovered accounting at Fox that wasn't very good. Remembering that, I sent for him and I asked him to study my contract, these documents, which he did. He said, "You will have to watch several things." One was the method of accounting for foreign distribution. One was their method—he said, "You see, they want their own pictures, too, in their own theatres, they want their own pictures in their own theatres for half."

In those days we didn't have any rules as to selling. They would take Sergeant York and sell five or six lesser pictures with it, thus reducing the income for [23] "Sergeant York." There were no distributing agreements.

Charles said the picture is going to do an enormous gross, and Warner Brothers were giving us different figures and I was very much disturbed. It all came to a head when I received a letter from

(Testimony of Jesse L. Lasky.)

the manager of Warners asking me to change the terms. That hurt me very much. I had been warned before. There were several other letters. I felt that once you made a deal, that is the deal. And my whole life was connected up with that picture. It represented my future and my past; and then I wrote a very long letter again, at first refusing to grant the request. It was insinuated that if I didn't I wouldn't be very happy, if I didn't grant the request. It was a request that I participate in the advertising. That is not normal business. No reason in the world why they should have asked me to participate. In this instance I gave in.

I gave in on that. There are other things that—at any rate, finally we had a good idea that if we could sell the contract—but by this time it was very well known that the picture was a success and about what the gross business was that it might do.

And I talked it over with my business advisor and we decided to sell it.

Q. Did you testify that you paid out to York for the rights and benefits of the York story immediately prior to [24] the time you received the check from Warner Brothers for $25,000.00?

A. Oh, yes, definitely.

Q. Did you ever buy the story rights to a picture called "Mark Twain" from the Twain estate?

A. Yes.

Q. What year was that?

A. About that same time. I was in Warner Brothers' employ at the time, I think—if I remem-

(Testimony of Jesse L. Lasky.)

ber correctly, I went up to New York and I had some influence and I knew the executive in charge of the Mark Twain estate, and I told Warner Brothers it would be a good idea, that picture of Mark Twain, and I would try to get the rights. I went to New York and acquired the rights and sold them back to Warner Brothers for what I paid for them.

Q. What was the date when you first went on the payroll of Warner Brothers, Mr. Lasky?

A. I wouldn't remember unless the contract—I would imagine it must have been around May. Wait a moment. This says "March or April." I have the same secretary in my employ for 25 years, and I asked him to go over my background and give me the dates and salaries I have earned through the years, and this says it is March 1940. It may be April.

Q. Would you examine your employment contract dated May 8, 1940? [25] A. Yes.

Q. And tell the Court whether or not you entered into that contract with Warner Brothers.

A. Is my signature on it?

Mr. McLane: It will be stipulated, counsel, that that is a correct copy of the photostat?

The Witness: I have got the original here.

Mr. McLane: All right.

The Court: The Court will receive the copy if it is stipulated that it is the correct copy.

Q. (By Mr. McLane): What is the date that appears on that contract, Mr. Lasky?

A. The 8th of May, 1940.

(Testimony of Jesse L. Lasky.)

Q. Was it entered into on that date?

A. It must have been.

Q. Would you turn to Paragraph 3, Mr. Lasky, of that contract, and read to the Court the first sentence.

A. "The term of this contract shall commence on April 1, 1940, and shall continue thereafter for a period of 52 weeks, unless sooner terminated as in this agreement provided."

Q. Mr. Lasky, if this contract was entered into on May 8, 1940, why does it state that it shall commence on April 1, 1940? [26]

A. I think I can—I will try to tell you. The problem was this: I said to Warner Brothers, "I have made three trips to Tennessee. I have had enough expense. I took an idea with me on one trip, and I have practically worked out the story in my own mind," and probably that is the reason they started me on salary sooner.

Q. Well, was it signed on May 8th or was it signed on April 1st? A. I don't remember.

Q. You don't know that.

A. No. I only know it was May 8th, as it says on here. Now, that could have been signed——

Q. Now, Mr. Lasky, would you turn to page——

The Court: There is a clause at the end of the agreement? Isn't that filled in?

Mr. McLane: Your Honor, that contract isn't notarized.

The Court: This copy that you have is an unsigned copy. Are the originals signed?

(Testimony of Jesse L. Lasky.)

Mr. McLane: Yes, the originals are, your Honor.

Q. (By Mr. McLane): Would you turn to page 6, Mr. Lasky, of that contract?

The Court: Excuse me just a minute. The original contract is not exactly the same. You have shown me one with [27] 22 paragraphs. The document counsel has shown the Court has eight paragraphs.

Q. (By Mr. McLane): That is the assignment of rights?

A. That is probably a reproduction of Exhibit 8.

Q. Turn to page——

The Court: Keep this comment in the record:

The last page on the contract simply states that the parties have executed the agreement the day and year first above written, which is stated to be on page 1, the 8th day of May, 1940.

All right, Mr. McLane.

By Mr. McLane: Thank you.

Q. Now, Mr. Lasky, turn to page 6, Paragraph 13. A. Yes.

Q. Read the first sentence of that paragraph.

A. "It is understood that the company has purchased from the producer all of producer's rights to, in and under a certain agreement dated March 23, 1940, between the producer and Alvin C. York, the original of which contract has been delivered to the company, and which rights are of value in connection with the future production of the photoplay, 'The Amazing Story of Sergeant York,' thereafter to be produced." [28]

(Testimony of Jesse L. Lasky.)

Q. Mr. Lasky, as I understood, you testified to the agreement dated May 15, and a supplemental agreement dated May 15, which were actually entered into on May 15, and now you say that this agreement was entered into on May 8. How could that be, because your rights have already been transferred to Warner Brothers?

A. You mean?

Q. "It is understood that the company has purchased from the producer all of producer's rights to, in and under a certain agreement dated March 23, 1940"——

You just stated that this contract was dated the 8th, and yet you testified before that the agreement assigning your rights to Warner Brothers was entered into on May 15 and a supplemental agreement was entered into on May 15. How can that be so, if these rights were already sold to Warner Brothers, and yet you say that on May 8th——

The Court: That is confusing to me.

Mr. McLane: I will restate it.

The Court: The stipulation refers to several agreements. You have in mind this agreement which is dated May 8?

Mr. McLane: That is correct.

The Court: What other agreements have you in mind?

Mr. McLane: The two dated May 15th, those two agreements. [29]

The Court: They are Exhibits 2 and 3?

Mr. McLane: Correct, your Honor.

(Testimony of Jesse L. Lasky.)

The Court: They are agreements between Jesse L. Lasky and Warner Brothers. The agreement of May 8, 1940, a copy of which you have handed the Court, has not yet been offered in evidence. Has it been offered in evidence?

Mr. McLane: No, your Honor. I will offer it in evidence now. I wanted to lay a foundation for it, but——

The Court: Well, you haven't yet marked it for identification, so we don't know whether you are talking about an exhibit or not.

What you are going to offer, that may be marked for identification as respondent's next in order, which will be what?

The Clerk: Exhibit D for identification.

(The document above referred to was marked Respondent's Exhibit D for identification.)

The Court: Now, Exhibit D for identification is an agreement between Warner Brothers and the Petitioner, Jesse L. Lasky, and Exhibits 2 and 3 are between Warner Brothers and Jesse L. Lasky.

In order that Mr. Lasky may be able to follow this rather complicated question, I will ask the Clerk to hand these three documents to Mr. Lasky.

You have in mind the question that is being asked? [30] Now, you have one of those before you, Mr. Lasky?

The Witness: Yes. May 8th.

The Court: All right. Will you restate the question?

Mr. McLane: All right, your Honor.

(Testimony of Jesse L. Lasky.)

Q. (By Mr. McLane): Mr. Lasky, you testified earlier, did you not, that on May 15th you transferred to Warner Brothers all your rights in and to a contract between Alvin York and yourself, dated March 23, 1940? A. Yes.

Q. Didn't you just testify that the contract of employment was entered into on May 8, 1940?

A. Yes.

Q. Turn to Paragraph 13 on page 6 of the agreement, which you say is dated May 8th, which you say was entered into on May 8th——

A. Yes.

Q. ——and read the first sentence.

A. "It is understood that the company has purchased from the producer all of the producer's rights to, in and under a certain agreement dated March 23, 1940"——

Q. My question is this: How could those rights already be in the hands of Warner Brothers on May 8th, when you [31] testified earlier that they were not transferred until May 15?

Mr. Harkins: Your Honor, I object. His testimony was that those documents on May 15——

Q. (By Mr. McLane): Well, did you transfer those rights to Warner Brothers at any other time other than May 15th?

A. The common practice is to discuss the deal, come to terms, and in connection with the terms or the question of employment, you come to the sale of the pictures and to the question of percentage compensation. That, of course, is clear in my mind.

(Testimony of Jesse L. Lasky.)

Having done all that, you are making a deal. With the idea of putting it into legal documents, that is another matter.

Q. What do you mean, when you made your deal, Mr. Lasky?

A. Well, I went to Warner Brothers and I persuaded them that they should purchase or acquire the rights to make the picture of Sergeant York. They were agreed to that and said, "What do you want?"

I said, as I remember, "I want a percentage."

They said, "A percentage of the profits?"

"No," I said, "I want a percentage of the gross." It is very good to account for just against production.

And they agreed to a percentage of the gross, and they agreed to employ me to produce the picture, with certain stipulations. One of those was that Hal Wallace would work [32] with me on it.

Q. When did this all take place, Mr. Lasky?

A. The probabilities are that it took place shortly after I returned from—if you would establish the date that I came back——

Q. I can't help you with that.

A. Because on that very day I was over to see Sam Goldwyn, and next I was over to Paramount, and very quickly I saw Warner Brothers.

Q. I show you an income tax return for 1940 and ask you whether or not that is your signature.

A. Yes, that is my signature.

Q. Now, on page 2 of that income tax return

(Testimony of Jesse L. Lasky.)

is the date shown for the trip to Jamestown, Tennessee. Now, what was the date that you returned from the last visit to Jamestown?

A. March 25.

Q. So that you entered into this agreement—by the way, was that a verbal agreement?

A. With Warner Brothers?

Q. Yes.

A. Well, usually that is the way you have an agreement: You discuss it, come to terms, and agree on the terms, and then sometimes it takes several days before the contracts are drawn. [33]

Q. You don't recall when you entered into the agreement, verbally, with Warner Brothers?

A. No, I do not.

Q. Was it between March 25th and April 1st?

A. I can only tell you this: Immediately after—I was very much concerned because I had just agreed to pay Sergeant York, and I returned as quick as I could. I wanted to dispose of it, and a very short time after that I was in to see Harry Warner. I went out to his ranch in the San Fernando Valley, and we talked about his returns on this.

Mr. McLane: There is no use belaboring the point.

I would like to offer in evidence a photostat of the payroll record from Warner Brothers, which I understand Mr. Harkins has had an opportunity to examine, as evidence of the date Mr. Lasky first went on the payroll at Warner Brothers.

Mr. Harkins: I have no objection.

The Court: It will be received in evidence and marked Respondent's Exhibit E. What is the date of this?

Mr. McLane: 8-11-41.

The Court: August 11th?

Mr. McLane: Yes, sir, 1941. Wait a moment. That is the beginning. There is no date for the setup, except the closing date of 4-25-1944.

The Court: I understood you to say that Exhibit E established the date on which Mr. Lasky was put on the payroll [34] at Warner Brothers. Now, I ask you what is the date.

Mr. McLane: 4-1-1940.

The Court: April 1, 1940?

Mr. McLane: Correct.

(The document above-referred to was received in evidence and marked Respondent's Exhibit E.)

Mr. McLane: Now, I would also like to offer in evidence the exhibit marked for identification D for the purpose of contradicting the dates on the May 15th agreements in order to show that the transaction between Mr. Lasky and Warner Brothers was a simultaneous transaction, that is, that the contracts of employment were entered into on the same date.

The Court: Any objection?

Mr. Harkins: What do you offer?

The Court: Read that, Mr. Reporter.

(Statement of counsel read.)

Mr. Harkins: I have an objection to that, based

on this: If we lay the framework of our prayer on the completed story of Sergeant York, United Artists has paid Mr. Lasky $805,000.00 for rights in two agreements dated May 15, 1940. The original incident, if it is an incident, the fact that he entered into a further agreement has nothing to do with the fact that he sold rights in two contracts for $805,000.00. And that is the point here, and this is the entire consideration at issue. [35]

Mr. McLane: May I say my reason?

The Court: Yes.

Mr. McLane: If your Honor please, I stated in my opening statement that one of the positions of the Respondent is that this percentage agreement between Mr. Lasky and Warner Brothers, dated May 15th, was actually incentive compensation for personal service as a producer. The supplemental agreement relates to the employment agreement and not to sell Mr. Lasky's rights to Sergeant York's story.

The Court: It is difficult to understand Respondent's counsel. At this moment, without reading Exhibit D, the objection as to the materiality is something the Court will have to consider later, depending on the theory of the Respondent. Actually in this case the Respondent has a theory he is going to develop, and the materiality of this particular point is eventually connected with this theory. Now the theory seems to be away from the area of the issue presented by the pleadings.

Mr. Harkins: That is my point, that he is bring-

ing up something that, if you let that evidence in, it would seem to me necessary that he amend his pleadings, and yet I am objecting to its introduction, and I think properly so. If it is kept out, the issue is met.

If your Honor please, the issue in this case has been pinpointed on whether the $805,000.00 received December 4 [36] from United Artists is ordinary income or capital gain.

Mr. McLane: Mr. Harkins' statement as to whether this is capital gains, of course, turns on the related question of whether or not it was actually ordinary income to Mr. Lasky, and if the Respondent should prevail in showing that this so-called supplemental agreement actually related to the contract of employment, then our position that this is incentive compensation for his personal service as producer would be supportable.

The Court: The incentive compensation which you have referred to is something other than consideration paid by United Artists? Is it not?

Mr. McLane: That is correct, your Honor.

The Court: Counsel for the Petitioner contends here that the issue narrows the treatment to be given the compensation paid by United Artists.

Mr. McLane: The larger principle in this case is that you cannot change the nature of the income, ordinary income, to capital gains, and I am not trying to set up a mathematical proposition. What he did receive in 1941 was ordinary income, and that is why I want to relate the contract of employment to the percentage arrangement.

We can't, it seems to me, determine the question on the transaction of December 4, 1942. It is very necessary to find out what was the nature of the income received by [37] Mr. Lasky.

Mr. Harkins: Your Honor——

The Court: Mr. McLane, one thing that troubles me at this point is the extended cross examination. If you want to develop some evidence after the Petitioner has submitted his case, then call Mr. Lasky as your own witness. You may do so. How are you going to proceed under the rule that your cross examination should take up the matters only that have been covered on direct examination?

Mr. McLane: All right, your Honor. I would like, then, to request that I be permitted to call Mr. Lasky as on direct examination, which I understand is permitted——

The Court: If you go ahead and produce some evidence—under what issue are you going to produce evidence?

Mr. McLane: Under the issue of whether or not Mr. Lasky actually transferred to United Artists ordinary income, that is, assigned United Artists his rights to participate in ordinary income. In other words, if your Honor characterizes this as an assignment of ordinary income, the presumption is that it cannot be capital gains. Of course, Mr. Harkins is arguing that it is capital gains.

The Court: It is 5:30, and we will recess until tomorrow morning. The point is the receipt in evidence of Exhibit D on materiality? [38]

Mr. Harkins: Yes. You are at a disadvantage.

not having read the three documents, but I believe you will find that counsel will have to go further in establishing his position that there is no obligation in these documents as the best evidence. Mr. Lasky had to do what he did do in order to get his rights under the May 15, 1940 agreement.

The Court: We will let the objection to Exhibit D stand until tomorrow morning, and at that time we will go into the matter again.

We have got so far with the agreement that is marked Exhibit D for identification that we will complete this line of inquiry in order to keep the record clear, but Mr. McLane has been advised by the Court that he should follow the usual rule of taking up on cross examination matters that come within the scope of the direct examination, and I believe we will follow that rule.

After we have finished with Exhibit D for identification, Mr. Clerk, what other exhibits have been marked for identification up to this point which have not been received in evidence?

The Clerk: Only D, your Honor.

The Court: Very well.

We have been following the schedule of starting at 9:30 in the morning. Is that inconvenient for you, Mr. McLane?

Mr. McLane: No. [39]

The Court: Mr. Harkins?

Mr. Harkins: No.

The Court: May I ask you now, Mr. Harkins, are you going to have another witness?

Mr. Harkins: It depends on your ruling on the

admission of some of Mr. McLane's cross examination. After his case in principal, I would have rebuttal with Mr. Lasky and Mr. Wright. I believe Mr. Wright is in the subpoena as a witness for the Respondent.

Mr. McLane: Your Honor, I expect to call Mr. Wright as my own witness. I assume it is not possible to get the information I am seeking from him on cross examination.

The Court: Very well. We will recess until tomorrow morning, until 9:30, and those who have been subpoenaed to appear will be asked to appear at about 10:00 o'clock or later.

It isn't strictly necessary for the other witnesses to be here until we are ready to hear them, but I will let counsel work that out with the witnesses. The others can come later.

(Whereupon, at 5:30 o'clock p.m., Monday, December 10, 1951, an adjournment was taken until 9:30 o'clock a.m., Tuesday, December 11, 1951.) [40-45]

The Court: May I see the exhibits, please.

At the time we adjourned last evening, there was an offer of an exhibit by Respondent, Exhibit D, and an objection to the exhibit.

Now, was the agreement of the May 10, 1940, Mr. McLane——

Mr. McLane: The 8th, your Honor.

The Court: Yes. That agreement has been previously designated as an employment contract.

Mr. McLane: We think that is a part of the two May 15th agreements, part of the same ar-

rangement, because it is executed about the same time. This is, we think, of the general pattern of hiring producers in the movie industry. It was all a part of what was called a package deal.

May I restate, after having a few moments to think it over again, some of the remarks of yesterday.

The issue in the case, it seems to Respondent, is whether Mr. Lasky transferred to United Artists on December 4, 1942, a capital asset or instead simply merely assigned a right to receive ordinary income. We think that one of the reasons he assigned ordinary income was because his share in the net earnings of Sergeant York was paid to him as additional or incentive compensation for services as producer and not for the sale of the story.

To prove this we have offered in evidence this contract, dated May 8th, between Mr. Lasky and Warner Brothers for the purpose of proving that the contract rights sold by Mr. Lasky in the May 15th agreements are an outgrowth and a very part of this employment contract of May 8th, which Mr. Harkins sought to keep out of the record. I think, naturally, that Mr. Harkins seeks to keep it out because it is unfavorable and contradicts his view of the case.

We think it should go in for two reasons. The record will show on direct examination yesterday Mr. Lasky testified that he entered into an employment contract with Warner Brothers.

And, two, cross examination would be proper as Mr. Harkins opened up the entire transac-

tion by direct examination. Subsequently, Respondent should be entitled to examine into the entire surroundings to determine just exactly what it was that Mr. Lasky sold to United Artists on December 4, 1942.

Your Honor, in the notice of deficiency, which Mr. Harkins has referred to, it has been determined that $805,000.00, representing earnings and profits of the motion picture "Sergeant York" from United Artists on December 4th, is taxable as ordinary income, received in the calendar year 1942.

The issue is whether or not it is ordinary income. [49] For Mr. Harkins to state that we have pin pointed the issue to the December 4th agreement, it seems to me, is over-simplification. We are trying to find out whether it is ordinary income or capital asset that was received on December 4th.

In order to do so we have to go back——

The Court: In general, what does Exhibit D provide, the agreement of May 8, 1940, provide? Have you a copy?

Mr. McLane: The contract provides that the company employs and engages a producer to render his services exclusively to the company except as after provided, for and during the term of agreement, which is, as I recall, fifty-two weeks—correct me, Mr. Lasky, if I am incorrect—that is, he is to receive $1,500.00 per week for a period of at least forty weeks or a gauranteed aggregate of $60,000.00.

The contract further provides that the contracts will commence on April 1st. That Lasky is to co-

operate in every manner with Warner Brothers. That he will render his services solely for the company. And the usual provisions that one finds in the contract for employment.

It also provides that at the date of this contract, Mr. Lasky has already sold to Warner Brothers the rights which were purported to have been sold on May 15th.

The Court: The objection is overruled.

Mr. McLane: The contract is also for the purpose of producing the picture "Sergeant York."

The Court: Objection is overruled. The document is received as Exhibit D.

Mr. Harkins: Exception.

The Court: The exception may be noted.

(The document heretofore marked Respondent's Exhibit D was received in evidence.)

[See pages 385-408.]

The Court: Mr. Lasky, will you resume the stand.

Whereupon,

JESSE L. LASKY

called as a witness for and on behalf of the Petitioner, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. McLane): Mr. Lasky, there is in evidence a payroll record, showing you entered the employ of Warner Brothers on April 1, 1940, If, as you say, the sale of the story rights took place on May 15th, why did Warner Brothers pay you

(Testimony of Jesse L. Lasky.)

approximately $9,000.00 for six weeks between April 1st and May 15th?

A. I can only surmise on account of it being a long time ago. It seems to me the probabilities are that there was a period of negotiation, and the deal was closed possibly before the contracts were finally executed.

Q. Approximately when would the deal have been closed, if you went on the payroll April 1st?

A. If I went on the payroll April 1st, I would think the deal was closed at that time.

Q. On April 1st?

A. It seems to me the contract—my only recollection for me would be to read the contract.

Q. Would you like to look at it again. I thought you had three copies. Do you have an extra copy, Mr. Harkins ?

The Court: You may use the Court's.

Mr. McLane: Thank you, your Honor.

Q. (By Mr. McLane): Here is the one of March 23rd, and here is the one of March 8th and the two of May 15th.

Mr. Harkins: Would you also show him Respondent's Exhibit E, the payroll service record.

Mr. McLane: Certainly.

The Court: Here it is, Mr. McLane.

Mr. McLane: Thank you, your Honor.

Q. (By Mr. McLane): It is the first line I am referring to. Would you read to the Court the description on the first line of the payroll service record.

(Testimony of Jesse L. Lasky.)

A. It is dated 4-1-40, supervisor, Sergeant York, department Sergeant York picture, the account number, and the rate of salary, $1500.00, fifty-two weeks——

Q. In other words, on April 1st, Warner Brothers hired [52] you to produce the picture "Sergeant York." In fact, that is why you went on the payroll? A. That is correct.

Q. What were the terms of the deal you had worked out on April 1st, or prior to that date?

A. It was very simple. They asked me how long I thought it would take to produce the picture. We estimated forty weeks. Then it was determined, I think, the pay, the salary, in fifty weeks or fifty-two weeks. But at any rate, I was to get, it was to amount to $60,000.00. I imagine at the rate of—divided into forty weeks, forty payments. The idle time referred to was probably a period of preparation.

Q. In other words, you were to receive $1,500.00 a week for at least forty weeks?

A. That is right.

Q. What else did the agreement provide?

A. It is this.

Q. What else, if anything, did the agreement provide relating to the sale of the picture "Sergeant York"? In other words, Warner Brothers wouldn't put you on the payroll for $1,500.00 a week unless they owned the story?

A. Yes.

Mr. Harkins: I believe the May 8th contract of

(Testimony of Jesse L. Lasky.)

employment hires Mr. Lasky for the purpose of producing a tentative picture "The Amazing Story of Sergeant York" or [53] any other production that might be selected by mutual agreement by the parties. It seems to me that counsel is contradicting the very exhibit he put in by argument.

Mr. McLane: I thought counsel made his position clear. We are not sure the agreement now in evidence embodies the terms of the agreement.

Mr. Harkins: I am referring to Paragraph 3 of the May 8th agreement.

Mr. McLane: That is exactly what we are seeking to discover here.

The Court: I don't find Mr. McLane out of order in this line of inquiry. If that is an objection, it is overruled. If it wasn't an objection, it was just an observation on your part?

Mr. Harkins: Yes.

The Court: You may proceed.

Q. (By Mr. McLane): You referred yesterday to a package deal.

A. I never referred to a package deal.

Mr. Harkins: I would like to have the reporter recite the exact words——

The Court: I believe the record shows you are in error, Mr. McLane.

Mr. McLane: Well, then I defer to your Honor. I thought on cross examination—if the court reporter—Mr. [54] Lasky referred in response to another question to a package deal, which he entered

(Testimony of Jesse L. Lasky.)

into with Warner Brothers. Would the reporter—I will withdraw it, your Honor.

The Court: May I point out we have a different reporter this morning and that he is using a Stenotype machine. The reporter who was here yesterday took manual shorthand notes in a notebook. I asked the reporter yesterday to bring back the notebook he was using yesterday.

Mr. Reporter, do you know anything about that matter?

The Reporter: Your Honor, I was instructed to tell you that the other reporter would be in later in the morning with his notebook.

Mr. McLane: Strike that question.

Q. (By Mr. McLane): What were the other terms in the agreement you entered into with Warner Brothers at approximately April 1st?

A. The matter in my mind is very simple. I entered into an agreement to produce the picture, which was the one we have just discussed, for which I also sold to Warner Brothers the rights I had acquired from Sergeant York.

Q. At the same time?

A. No. Actually, it was the other way around.

Q. What do you mean "It was the other way around"?

A. I went to Warner Brothers to sell the property that [55] I had acquired from Sergeant York, and we finally arrived at terms.

Q. When was that, Mr. Lasky?

(Testimony of Jesse L. Lasky.)

The Court: We went over that yesterday didn't we?

Mr. McLane: I don't believe so, your Honor. I am not sure that Mr. Lasky is not now referring to sometime prior to April 1st.

The Court: Well, Mr. Lasky, when did you go to Warner Brothers, and when did you arrive at an agreement upon your terms?

The Witness: I don't remember the date. I can only say I went to Warner Brothers because I had acquired the rights from Sergeant York to produce the story of his life. I went there to sell them those rights.

The Court: Was that before you went to Tennessee or after?

The Witness: After I came back.

The Court: Well, you were asked yesterday to try to refresh your recollection about dates, Mr. Lasky. We will have to ask you to try to do it again this morning.

The Witness: In 1940, as I remember, from this testimony, my salary started, the salary for producing the picture started in April 1st. So it must have been before that. I made three trips to Tennessee by plane.

After the third trip is when we actually acquired the [56] rights. I spent a few days visiting various studios.

And then, as I said yesterday, I called on Warner Brothers, on Mr. Harry Warner. And I needn't

(Testimony of Jesse L. Lasky.)

repeat that story. The results of that story I agreed to sell them the rights to make the picture.

Now, a question came up then——

The Court: Yesterday counsel showed Mr. Lasky a statement in a return or in a report from which he refreshed his recollection——

Mr. McLane: It was a business expense item, your Honor, indicating that Mr. Lasky had returned from Jamestown, Tennessee on March 25th.

The Witness: That is right.

The Court: You recall that testimony then?

The Witness: Yes, I remember.

The Court: I think you ought to show that exhibit to Mr. Lasky again.

Mr. McLane: I suppose we ought to have it marked for identification if it is necessary to have him use it to refresh his recollection.

The Court: You may. Are you going to offer it later?

Mr. McLane: No, I don't think so.

The Court: It will be marked for identification.

The Clerk: Exhibit F for identification. [57]

(The document above-referred to was marked Respondent's Exhibit F for identification.)

Mr. McLane: These income tax returns are rather thick, your Honor. Some of them I would rather not introduce. If they are necessary——

Mr. Harkins: Is that the 1940 income tax return?

Mr. McLane: Yes. On Page 2, Mr. Harkins, the item is under business expenses. It is found there

(Testimony of Jesse L. Lasky.)

the three dates of the three trips to Jamestown, Tennessee.

The Court: I want the record to be clear on this. Exhibit F for identification is Mr. Lasky's income tax return for 1940, is that correct?

Mr. McLane: That is correct, your Honor. The item we are referring to is listed under business expenses on Page 2.

Q. (By Mr. McLane): What we are trying to find out now, Mr. Lasky, are the terms of the agreement between yourself and Warner Brothers, relating to the sale of that story "Sergeant York." In other words, it was entered into between March 25th and April 1st. What was the——

The Court: That is a statement of counsel. Is that true, Mr. Lasky, or not?

The Witness: Well, all it says here—my last trip I must have returned from on the 25th of March. I am [58] sure it is correct.

Mr. McLane: Mr. Lasky has previously said in answer to a question that the agreements were probably entered into during or before April 1st, before he went on salary. That is why I want to ask the question what did those agreements provide insofar as the sale of the story, in other words, I am trying to find out——

The Court: The Court would like to know whether Mr. Lasky really remembers, really knows when these agreements were entered into?

The Witness: I don't remember the date. This refreshes my mind I came back from Tennessee

(Testimony of Jesse L. Lasky.)

with the deal concluded with Sergeant York on March 25th. Now, it was after that, and it couldn't have been very long that I——

Mr. McLane: Your Honor, I——

The Court: I am not finished yet, Mr. McLane.

Mr. McLane: Excuse me, your Honor.

The Court: March 25th is five days before April 1st, isn't it?

The Witness: Yes.

The Court: How long did your negotiations—how much time did the negotiations consume? Five days? Can you remember that?

The Witness: I would have said more than that. I can tell you the routine. For instance, one day——

The Court: All right. If it will help you to refresh your recollection, I think it might also be necessary for counsel, Mr. Harkins to give you the dates of these various agreements. It is very difficult for a witness to keep in mind dates of exhibits. The question is important if we want to have Mr. Lasky's best recollection.

Would you like, Mr. Harkins, to look at the exhibits? There are now several agreements in evidence.

Mr. Harkins: It is not necessary, your Honor. I have them in mind. I can——

The Court: Exhibit D is May 8th, 1940. May I have the other contracts, Mr. Clerk.

The Clerk: Yes, your Honor.

The Court: The contract of sale, Exhibit 78—those are the later ones. We are not interested in

(Testimony of Jesse L. Lasky.)

this one. Here is a copy of a May 8th agreement, Mr. McLane. You may want this.

Mr. McLane: I have one, your Honor, if you want to keep it. You want me to show it to the witness?

The Court: I do not have these other exhibits, Mr. Lasky.

What are the dates of these various agreements, Mr. Harkins?

Mr. Harkins: The employment contract, Exhibit D, is dated May 8, 1940. The first agreement, involving the sale [60] of the Sergeant York story to Warner Brothers, is dated May 15, 1940 and recites a cash consideration——

The Court: I only want the dates.

Mr. Harkins: The supplemental agreement, May 15, 1940, the agreement with Warner Brothers, is also dated May 15, 1940.

The Court: So the 1940 agreements, if I may refer to them generally in that way, comprise two agreements and a supplementary agreement to one of them, is that correct?

Mr. Harkins: That is the first agreement, the employment contract. The second agreement purports to be a sales contract with concurrent supplemental agreement covering a participation in proceeds.

Mr. McLane: The Respondent feels they are all part of the same arrangement and were probably entered into on the same date.

(Testimony of Jesse L. Lasky.)

The Court: I understand. I want to get the dates from Mr. Lasky.

You have the dates of the agreements before you. Your recollection has been refreshed on the date of your return from your third trip to Tennessee, which was March 25, 1940. Some question has been raised in the cross examination as to whether these agreements were executed on the date they bear, you see.

Counsel is now asking you when you executed— [61] isn't that question, when the agreement, the so-called employment agreement of May 8, 1940, was executed?

Mr. McLane: Yes. I thought Mr. Lasky had said——

The Court: That is what you want to know?

Mr. McLane: Yes.

The Court: All right. Now, Mr. Lasky, you have those dates in mind. You have in mind the date you returned from your trip. You must have in mind the time that it took for you to call on the studios, confer with Warner Brothers, and work out terms. I believe the question was on that day were the terms agreed to?

The Witness: It is impossible for me to remember that. It is ten years ago, for me to remember the date. I remember the incidents and can describe them, naturally, because they were important. I don't remember the dates.

I couldn't for the life of me told you I came back on March 25th. I got that from the tax report.

(Testimony of Jesse L. Lasky.)

I know on March 25th I had acquired the right. Therefore, subsequently, everything after that must have happened after that date.

The Court: Do you recall whether there was an interval of time between your having worked out the agreement with Warner Brothers about various matters and the attorneys going through the work of drafting the agreements? [62]

The Witness: Yes. There was some time elapsed, I imagine, I think before the contracts were actually executed before they were drafted. There were conferences between Warner Brothers' attorneys and my attorneys, and naturally, that took some time.

The Court: Do you know whether you were entered on the payroll at Warner Brothers before the agreements were signed; or were the agreements signed and were you put on Warner Brothers payroll at the same time? Was there any retroactive dating of anything?

The Witness: It is quite possible that the Warner Brothers put me on the payroll, even though the contracts weren't ready. That could have happened.

For instance, I checked with my secretary who was with me at that time. He said I received my first salary, I think, on April 1st. He said March 30th. But the contracts apparently hadn't been executed.

The Court: As far as I can see, the witness really doesn't know.

(Testimony of Jesse L. Lasky.)

Mr. McLane: What I wanted to find out was whether or not Warner Brothers——

The Court: You go ahead and ask what questions you want. You don't have to explain to the Court what you intend to do, Mr. McLane. [63]

Q. (By Mr. McLane): I asked you a question whether Warner Brothers put an individual on the payroll at $1,500.00 a week without having some sort of agreement with him before they put him on the payroll.

Your answer was, no, they did not.

Consequently, if you were put on the payroll April 1st, you must have had some kind of agreement with Warner Brothers?

A. It is a common occurrence. That happened to me only recently. You enter into an agreement with the company and that is understood. You probably have a memorandum. It goes to the legal department, and they are very slow. I know at——

Q. I can appreciate that.

A. ——I know at Metro-Goldwyn-Mayer it was ten weeks after I started to produce the "Great Caruso" before there were any papers executed, but I was getting a salary right along——

Q. What I want to know is what were the terms——

The Court: Have you finished, Mr. Lasky? Go ahead and finish your answer, if you want to.

The Witness: It seems to me that it is probably what happened in this case, that is, the Warner Brothers having agreed on the deal that I went on

(Testimony of Jesse L. Lasky.)

salary. But the papers may not have been ready. The papers would have cited [64] the date that I was to start my duties.

Q. (By Mr. McLane): What were the terms of that deal? That is what I am trying to find out.

Mr. Harkins: I would like to have counsel explain what he means by "deal".

Q. (By Mr. McLane): The arrangement you entered into with Warner Brothers to go on the payroll at $1,500.00 a week and the arrangement relating to the sale of the story. What did you agree with regard to your conversations with Mr. Warner?

A. Your Honor, I remember all of these things. I can explain them in my own way.

You must remember we first sold the rights to Warner Brothers for them to produce "Sergeant York." That is clear in my mind, because then the question came up about producing it.

And they had one Hal Wallace, who was general producer. Their contracts provided he had to have his name on all pictures. I said that I was satisfied if I didn't produce it.

We sold the picture rights. And they said, "No, you have made these trips to Tennessee. You have told us a version of the story. Your knowledge is pertinent. We would like you to produce it." [65]

It was promised—it was agreed that Hal Wallace and Jesse Lasky would share joint credit. My name would be first. Thereupon, I was employed to produce the picture.

(Testimony of Jesse L. Lasky.)

If I hadn't agreed or compromised, the picture would have been produced just the same. But I wouldn't have the salary as producer.

Q. Your story is that you entered into an agreement with Warner Brothers whereby you first sold the story and then you entered into an agreement to become a producer for it. Now, what was the consideration for the sale of the story?

A. Well, first we sold the story, I think, at its cost. And then I was to receive twenty percent of the gross receipts up to a certain figure, and then twenty-five percent.

Q. What was the cost of the story?

A. I am guessing—I think it was $50,000.00. I say that because it might have been $25,000.00. I borrowed $25,000.00 on my life insurance.

Q. Let me refresh your recollection. Could you refresh your recollection with these two checks, Mr. Lasky?

Mr. McLane: Could we have this marked for identification, Mr. Clerk.

The Clerk: Exhibit G for identification.

(The document above-referred to was marked Respondent's Exhibit G for identification.)

The Court: The date of the checks? [67]

Mr. McLane: The date of the checks, your Honor are——

The Clerk: Exhibit H for identification.

(The document above-referred to was marked Respondent's Exhibit H for identification.)

(Testimony of Jesse L. Lasky.)

Mr. McLane: ——5-15-40 is Exhibit G. And Exhibit H, 7-16-40.

Mr. Harkins: I don't see how they will aid the situation. The question was as to the cost of the story. Mr. Lasky started to answer in terms of cost, whereas these checks refer to a price paid by Warner Brothers——

Q. (By Mr. McLane): Mr. Lasky, what were you paid by Warner Brothers in cash for the sale of the story "Sergeant York"?

A. Frankly, I don't remember. It was——

Q. Can you refresh your recollection from these two photostats?

A. May I make this statement, which might help us all. When I purchased the story from Sergeant York, I also agreed he would have a minimum of four percent of the gross, and that as the gross went up, his percentage would also go up. Therefore, I obligated myself to pay him so much cash and four percent of the profits——

The Court: Of the picture?

The Witness: Of the gross receipts. [67]

Q. (By Mr. McLane): How much did you receive in cash from Warner Brothers for the sale of the story? You can refresh your recollection, I think, by turning to the contract allegedly dated May 15th and the two checks. I think if you try you will be able to get the figures from those three items.

A. Well, it says here I paid Sergeant York

(Testimony of Jesse L. Lasky.)

$25,000.00. That is correct. It says, "The purchaser agrees to pay the seller"—I am the seller?

Q. That is right.

Q. "* * * the sum of Forty Thousand Dollars ($40,000.00) at the following times; (a) Thirty-two Thousand Five Hundred Dollars ($32,500.00)"——

The Court: You are the purchaser.

Mr. McLane: This is the contract between Warner Brothers and Mr. Lasky, your Honor.

The Witness: Yes, I see it. "Thirty-Two Thousand Five Hundred Dollars ($32,500.00) upon the execution of this agreement, receipt of which said sum is hereby acknowledged by Seller; (b) The balance of Seven Thousand Five Hundred Dollars ($7,500.00) upon the receipt by Purchaser of all necessary assignments * * *" etc. Apparently then they paid $40,000.00.

Q. (By Mr. McLane): Would you check these two checks and tell me whether or not those two amounts reflect the payment of $40,000.00. [68]

A. I think they certainly do.

Mr. McLane: I would like to offer these in evidence as Respondent's exhibits next in order.

The Court: Any objections?

Mr. Harkins: No objection.

The Court: Those are received in evidence as Exhibits G and H.

(The documents heretofore marked Respondent's Exhibits G and H were received in evidence.)

Q. (By Mr. McLane): Now, Mr. Lasky, your

(Testimony of Jesse L. Lasky.)

story is then that you went down to Jamestown, Tennessee, and paid Mr. York $25,000.00 for his life story.

A. Yes.

Q. Then you came back to Hollywood or Los Angeles or wherever it happened to be, and you sold that story for $40,000.00 plus a percentage of the profits?

A. Wait a minute. I bought the story for $25,000.00 plus——

Q. Plus——

A. Plus four percent, the obligation to pay him four percent.

Q. It cost you $25,000.00, didn't it?

A. Yes.

Q. So you actually got $15,000.00 cash from Warner Brothers?

A. Just a moment. I figured that figure—it took [69] weeks of my time.

Q. So, you weren't really compensated for the $25,000.00. You spent more than that actually?

A. I must have.

Q. All you really got was a right to participate in the earnings of the picture "Sergeant York"?

A. No. I got the difference between $25,000.00 and $40,000.00.

Q. Which is $15,000.00?

A. Yes. And I suppose——

Q. At that time did you have any guarantee that the picture would be produced?

(Testimony of Jesse L. Lasky.)

A. What do you mean?

Q. When you sold it to Warner Brothers?

A. Well, I most certainly—I had whatever guarantee the contract provided.

Q. Did the contract provide that it would be produced? A. I would think so.

Q. What guarantee did you have that the picture would gross over a million and a half dollars?

A. There was no guarantee.

Q. So then you were risking everything on the question of whether or not the picture would make over a million and a half dollars, because you didn't participate until after that sum had been reached?

Mr. Harkins: I think the contract should speak for itself in those respects, in that the figure in the contract is $1,600,000.00.

Mr. McLane: I am sorry. $1,600,000.00. I miscalculated it by $100,000.00. Is that correct?

The Witness: It is very simple. I had sold the picture to Warner Brothers, and they agreed that I would participate. That I would receive a percentage of the gross and naturally, I anticipated that it would be produced. I think the contract provided that the picture would have to be produced.

If it was produced I was to be a success.

Mr. McLane: You sold the story for $40,000.00 and the right to participate in the earnings?

A. Yes.

Q. Now, Mr. Lasky, is that the way a motion picture producer makes his living in Hollywood? I understand that——

(Testimony of Jesse L. Lasky.)

Mr. Harkins: I object——

The Court: The objection is sustained.

Mr. McLane: I will withdraw the question.

Q. (By Mr. McLane): In other words, you were primarily interested in getting a percentage of the earnings rather than $1,500.00 a week for forty weeks?

A. I was primarily interested in selling my rights for [71] the largest sum possible.

Q. Would you have sold your rights without an employment contract? A. Yes.

Q. Do you recall purchasing a story "The Connecticut Yankee"?

A. May I tell you why I obligated myself for four percent to Sergeant York? I didn't feel that the sum I had paid him was adequate but I assured him that the subject matter would earn him more. And it was my suggestion that he get four percent of the gross. So I was obligated there to sell it.

Q. How could you assure him of that if you hadn't sold the picture yet?

A. My experience went over many, many years.

The Court: There is something here, I think, that needs to be made clear.

Mr. McLane: That is Exhibit 1, your Honor, I believe.

The Court: Where is the statement about the material that Mr. Lasky really purchased.

Mr. McLane: In the contract of March——

The Court: There is a statement in the petition,

(Testimony of Jesse L. Lasky.)

and it was not, I suppose, that is not admitted by the Respondent. And the parties have not entered into a stipulation of facts, which are the same as the facts alleged in the [72] petition on page 3.

I would like to know more about what Mr. Lasky purchased from Sergeant York.

Was your contract with Sergeant York in writing, Mr. Lasky?

The Witness: Yes.

The Court: And that has not been introduced.

Mr. Harkins: It is Exhibit 1A of the stipulation of facts.

The Court: The contract with Sergeant York?

Mr. Harkins: Yes, your Honor, March 23, 1940.

The Court: Has Mr. Lasky Exhibit 1A?

The Witness: Yes, I have it, your Honor.

The Court: May I see it, please.

Mr. Harkins: This is my copy.

The Court: Then Exhibit 1A, the contract between Mr. Lasky and Sergeant York, dated March 23, 1940, Mr. York agreed to sell to Mr. Lasky his sole and exclusive motion picture, radio, television and dramatic rights in and to certain books, which had been published: "Sergeant York and His People," by Sam K. Cowan; "Sergeant York, Last of Long Hunters" by Tom Skeyhill; "The War Diary of Sergeant York," copyrighted by Doubleday-Doran.

So Sergeant York sold to Mr. Lasky whatever rights he had in these stories, as I understand it.

Mr. Harkins: Well, your Honor, the concluding

(Testimony of Jesse L. Lasky.)

portion of that paragraph is also important. Perhaps it is really the most important part of it, that is, including the theme of these stories and all incidents based on the life of Sergeant York and material in the Congressional Record.

The Court: Well, some of the questions that have been asked Mr. Lasky imply Sergeant York had his own story that he was selling to Mr. Lasky. That isn't exactly true. Sergeant York has been the subject of stories. He was a colorful figure. He had an unusual life, and his life has been written up by others. He had some rights, I presume, in those stories that had been written by others.

Mr. Harkins: The contract goes on to convey to Lasky or assigns the right to use the name and likeness of Sergeant York, to use the theme of his life story, including fictional elements, to make it a proper story for motion pictures. The only stipulation Sergeant York made was that the Battle of the Argonne scene, as detailed in the Congressional Record, would have to be produced exactly as described with no fictional elements in it.

It was really a theme that was being acquired and included copyrighted works, because to use a theme that is the subject of copyrighted works might lead to litigation involving plagiarism.

Mr. Lasky bought really the theme. [74]

The Court: It included Sergeant York's interest in those books.

The Witness: This might help. I went back to Tennessee with Sergeant York, met his wife and his

(Testimony of Jesse L. Lasky.)

neighbors and took a writer with me. And we asked them questions and augmented the material that we already had and found that some of the most interesting material had never been published.

The Court: Was that before March 25th?

The Witness: That was after the contract.

The Court: After the contracts were signed you went back?

The Witness: Yes. I felt as though—and he gave us the rights in the contract. He was trying to sell everything he had so we could properly, authentically, portray his life——

The Court: The story of his life.

The Witness: We did have the right of dramatic license to incorporate occasional fiction in order to make the story coherent.

The Court: All right. Mr. McLane, go ahead.

Mr. McLane: Thank you, your Honor.

Q. (By Mr. McLane): Now, you said that Sergeant York was entitled to a percentage of the profits? A. Of the gross. [75]

Q. Of the gross profits of the picture "Sergeant York." Have you got that contract of March 23rd? Look on Pages 7 and 8, at the bottom of Page 8. I will read this for convenience sake.

It says at the bottom of Page 8, Subparagraph (c); "In addition to the foregoing, Lasky agrees to pay to York a sum equal to four per cent. (4%) of the amount of the gross receipts from the distribution of each motion picture as may be made hereunder shall exceed three million dollars."

(Testimony of Jesse L. Lasky.)

Do you see that?

A. Yes.

Q. In other words, Sergeant York was not to receive a percentage until after the picture grossed $3,000,000.00? A. Yes, that is right.

Q. Who assumed that obligation from you?

A. Warner Brothers.

The Court: What contract contains the assumption of that obligation by Warner Brothers?

Mr. McLane: That is the contract allegedly dated May 15th.

Mr. Harkins: Yes.

Q. (By Mr. McLane): Do you recall, Mr. Lasky, purchasing the rights in and to a story entitled "A Connecticut Yankee" on August 11, [76] 1941?

A. Yes.

Q. That was "A Connecticut in King Arthur's Court"? A. That is correct.

Mr. McLane: May we have this marked for identification?

The Clerk: Exhibit I for identification.

(The document above-referred to was marked Respondent's Exhibit I for identification.)

Q. (By Mr. McLane): I hand you a photostatic copy, which Mr. Harkins has already examined, of an agreement between yourself and Warner Brothers, dated August 11, 1941. What was the substance of that agreement, Mr. Lasky?

A. You mean the terms?

Q. Yes.

A. Well, I don't remember the details. I went

(Testimony of Jesse L. Lasky.)

to New York—I requested permission from Warner Brothers to go to New York, because I could buy it, and they could not buy it, on account of my relations with the Mark Twain estate.

I went to New York and I purchased—I think probably I had an option and then came back and Warner Brothers purchased it from me.

Q. You purchased that story from the estate of Mark Twain, in other words? [77]

A. Yes.

Q. And then you brought it back and conveyed it to Warner Brothers? A. Yes.

Q. Did you receive from Warner Brothers, prior to your trip, amounts of money to cover the purchase? You just stated you were employed by Warner Brothers at that time.

A. No. I was working for Warner Brothers. I was producing, I think, for Warner Brothers at that time. And I had no right to transactions of outside business. So I told them that I could, due to my acquaintance with the estate, purchase—I actually went to purchase the Life of Mark Twain, which we called "The Adventures of Mark Twain".

While I was there, they suggested that the other story, "The Connecticut Yankee", was also available. I either purchased or took an option, I can't remember which. I think——

Q. So that—excuse me, go ahead.

A. That is it.

Q. So that you purchased at the same time another story from the Mark Twain estate.

(Testimony of Jesse L. Lasky.)

May we have this marked for identification.

The Clerk: Exhibit J for identification. [78]

(The document above-referred to was marked Respondent's Exhibit J for identification.)

Mr. Harkins: What is that?

Mr. McLane: This is the Mark Twain contract.

Mr. Harkins: What is the date?

Mr. McLane: August 11th.

The Court: What year?

Mr. McLane: 1941, your Honor.

The Court: What is the date of the "Connecticut Yankee"?

Mr. McLane: The same date.

The Court: 1941?

Mr. McLane: Yes, your Honor.

Q. (By Mr. McLane): Did you sell these two stories to Warner Brothers? A. Yes.

Q. What were the terms of those agreements? You don't recall? A. No.

Q. Would you like to examine the contracts, Mr. Lasky. A. It says $50,000.00.

Q. Maybe I can save a little time. Did you receive anything other than cash payment for sale of the "Connecticut Yankee"? A. No. [79]

Q. Did you receive anything other than cash payment for the sale of the "Mark Twain Story"?

A. No.

Mr. Harkins: I suggest that he read from the contract the terms of consideration.

Mr. McLane: All right.

Mr. Harkins: Start here (indicating).

(Testimony of Jesse L. Lasky.)

The Witness: "The Purchaser agrees to pay to the Seller the sum of $50,000.00, of which sum the Purchaser agrees to pay $18,500.00 upon execution of this contract. The balance of said purchase price, being the sum of $31,500.00, to the Mark Twain Company or such other persons they may specify under the terms of Exhibit B, which payment shall be at the times and manner specified in said Exhibit B." [80]

Mr. McLane: I am going to offer these in evidence, your Honor, if it would save any time.

Q. (By Mr. McLane): Was there anything in either one of those agreements, Mr. Lasky, that gave you a percentage of the gross profits of either of those pictures?

Mr. Harkins: It seems to me the agreements should speak for themselves, if they are going to be offered in evidence. It is hardly fair to Mr. Lasky to ask him to recall that.

Mr. McLane: I thought I would bring it out during the trial but they will speak for themselves.

I would like to offer in evidence the documents previously identified as Respondent's Exhibits I and J for identification.

Mr. Harkins: No objection.

The Court: Exhibits I and J are received in evidence.

(The documents heretofore marked Respondent's Exhibits I and J were received in evidence.)

Q. (By Mr. McLane): Isn't it a fact that

(Testimony of Jesse L. Lasky.)

Warner Brothers never did produce "A Connecticut in King Arthur's Court"?

A. They never produced it.

Q. Why? [81]

A. Well, after they studied it, they were afraid it might not be box office and eventually they sold it.

Q. They sold it? A. I think so.

Q. As a matter of fact, it would have been difficult to give you part of the earnings?

Mr. McLane: I withdraw it.

The Court: The objection is sustained.

Mr. McLane: My apologies, your Honor. I withdraw the question.

I would like to have marked for identification a summary of employment record.

The Court: Mark it for identification as Exhibit K.

The Clerk: Exhibit K for identification.

(The document above-referred to was marked Respondent's Exhibit K for identification.)

Q. (By Mr. McLane): I hand you a photostat of summary of employment record so that you may refresh your recollection on your dates of employment with Warner Brothers. How many stories did you sell to Warner Brothers during that period of time?

The Court: What period of time?

Q. (By Mr. McLane): Would you state the period that is stated in there.

A. From 4-40 to 4-24-44. [82]

Mr. Harkins: Your Honor, in looking at this

(Testimony of Jesse L. Lasky.)

record, the statement of dates implies a continuous period of employment, whereas looking at this exhibit it shows gaps in employment. So it is inaccurate. There is a gap in time here. There is a gap of time in which he was not employed by Warner Brothers.

The Court: Will the reporter read the question.

(Question was read.)

The Court: Please reframe your question. Ask the witness within a certain period of time.

Mr. Harkins: Following what the reporter has read, I think, your Honor, injected from the bench what time. And then Mr. McLane asked Mr. Lasky to read the dates. He read the dates as 4-40 to 4-24-44. I would like to have that material go out of the record, because the reading from this record marked for identification it is not an accurate statement of the dates of employment.

The Court: Your motion to strike is denied. Whatever is not clear, we shall try to get cleared up.

The question was not well framed in the first place, and you may clear that up, if you want to on redirect examination.

Q. (By Mr. McLane): Mr. Lasky, you stated that you went on the payroll on April 1, 1940, or at least the employment payment sheet [83] shows you went on the payroll April 1, 1940. This summary employment record shows that you left the payroll on 9-30-44.

(Testimony of Jesse L. Lasky.)

Between those dates, how many stories did you sell to Warner Brothers?

A. Just the two that we have mentioned.

Q. "A Connecticut Yankee"——

A. "A Connecticut Yankee" and "Adventures of Mark Twain."

Q. Did you sell any stories to any other studios?

A. No.

Q. How long ago was it that you bought the "Great Caruso"?

A. About five years ago, five, maybe six years ago, I would say.

Q. How many months would it take, normally, to produce "Sergeant York," "A Connecticut Yankee in King Arthur's Court," "Adventures of Mark Twain"?

Mr. Harkins: I think that is——

Mr. McLane: Mr. Lasky is a producer here. He certainly ought to know how long it would take him to produce three pictures.

Mr. Harkins: That is the point, him or some other company.

Mr. McLane: Mr. Lasky.

The Witness: Well, I would say preparation and all, [84] possibly forty weeks.

Q. (By Mr. McLane): For each one?

A. Yes.

Q. That is 120 weeks? A. Yes.

Q. Did you actually produce "The Adventures of Mark Twain"? A. Yes.

The Court: Do you mean did Mr. Lasky?

(Testimony of Jesse L. Lasky.)

Mr. McLane: Yes. Did Mr. Lasky produce it.

The Witness: Warner Brothers are the producer. I produced it for Warner Brothers, yes.

The Court: The Mark Twain story?

The Witness: Yes, "The Adventures of Mark Twain." I was employed—there must have been another contract after to produce Mark Twain.

Q. (By Mr. McLane): Mr. Lasky, I show you this summary employment record and point to the third entry in the first column. Well, let's start with the second entry on the second column.

What are the dates of employment listed?

A. 5-19-41 to 6-7-41.

Q. So you went off the payroll on 6-7-41 and then you went back on the payroll on what date?

A. On the eighth month, 8-11-41.

Q. That is the same date of the sale of the "Connecticut Yankee" and the "Mark Twain" story, isn't it?

A. If the contract says, I wouldn't remember that.

Mr. McLane: I would like to offer in evidence what has previously been identified as Respondent's Exhibit K for identification.

The Court: It will be received in evidence as Exhibit K.

(The document heretofore marked Respondent's Exhibit K was received in evidence.)

Q. (By Mr. McLane): You stated previously, Mr. Lasky, I believe, that you were employed for forty weeks under the "Sergeant York" arrangement. That was the term of the contract. Didn't

(Testimony of Jesse L. Lasky.)

Warner Brothers usually employ you for a fifty-two week period?

A. Well, they never employed me before that. That as the first contract.

Q. How about after that?

A. After that, I think it was a fifty-two week period.

Mr. Harkins: I think this is another instance in which the exhibit in the record should speak for itself. The exhibit you admitted as, I believe, Exhibit D, the May 8, 1940, employment contract speaks of employment for fifty-two weeks.

The Court: Well, it is repetitious, but I don't think that is objectionable. [86]

Q. (By Mr. McLane): Did Warner Brothers offer you a job as motion picture producer in 1940 before you obtained the rights to the Sergeant York job? A. No.

Q. In other words, the ownership of that story was something that you had to have before you could be employed by Warner Brothers?

A. Not necessarily, no.

Q. Wasn't that the fact of the case?

A. Well, the fact is simply this. I went to Warner Brothers to sell them Sergeant York. As a result of that negotiation, they employed me to produce it as well.

Q. Had they offered you a job as motion picture producer before that time? A. No.

Q. You are one of the pioneers in the motion picture business, isn't that correct?

(Testimony of Jesse L. Lasky.)

A. Yes. I might say I don't think I was available before that time.

Mr. McLane: May I have the 1940 return, Mr. Baird. Do you have that Mr. Lasky?

The Witness: Yes, May 1940?

Mr. McLane: Yes. [87]

Q. (By Mr. McLane): Would you turn to that return, right to your right, to the 1940 income tax, to the far right of the table.

A. This income tax return, I suppose, yes.

Q. Let's see——

The Court: I would suggest, Mr. McLane, that you follow that well-known form of saying, "Now, Mr. Witness, I show you exhibit so and so and ask you whether." That saves the witness from having to find his way around the exhibit, if you would, please.

Q. (By Mr. McLane): I hand you this Exhibit F and ask you to turn Page 1 of the statement of income. I ask you to read the description of the $25,000.00 item received from Warner Brothers, starting here.

A. "Warner Brothers Pictures, Inc., reimbursement by Warners for some of $25,000.00, personal, paid out to close contract with Sergeant Alvin W. York for option to purchase rights to life of Sergeant York."

Q. For option to purchase rights?

A. Yes.

Q. When did you acquire that option from Sergeant York?

A. That is a hard question to answer.

(Testimony of Jesse L. Lasky.)

Q. You acquired it before the March 23rd contract, did you not? [88] A. Yes, I think so.

Q. You don't recall just roughly when that was?

A. Well, I made three trips to Tennessee——

Q. I think you have the dates of those on Page 2, Mr. Lasky. A. On this——

Q. Page 2 of the income tax return. I will show it to you. Right here. They are the dates of the trips. Did you get the option on the first trip or the second trip?

A. Wait until I read this. It simply says I made three trips with attorneys to negotiate contract with Sergeant York for purpose of rights to film.

Q. When did you get the option?

A. It seems to me that we acquired the rights and option at the same time. In other words, until the negotiations were concluded, I had no option.

Q. Well, you have an item described in your income tax return as $25,000.00 reimbursement for option obtained from Sergeant York.

A. I think that is the trips, isn't that it?

Q. I doubt whether the option for the purchase of his life story reflects to the trips. It reflects the expenditures for the trip——

The Court: Mr. McLane——

Mr. McLane: I am trying to find out—— [89]

The Court: Mr. McLane, are you trying to ascertain whether the $25,000.00 paid to Sergeant York by Mr. Lasky and a $25,000.00 payment described in Exhibit F is a payment for an option or

(Testimony of Jesse L. Lasky.)

two different payments or are the same payment. What is your thought there?

Mr. McLane: I really don't know. That is what I am trying to find out.

The Court: You are trying to find out.

Mr. Lasky, you have testified that you said Sergeant York $25,000.00.

The Witness: That is right.

The Court: Is that the total amount you were to pay Sergeant York exclusive of the four per cent of receipts?

The Witness: Is that what the contract shows? I don't remember.

The Court: You don't remember?

Mr. Harkins: No, there was another $25,000.00.

The Court: You said $25,000.00 before. Kindly show that to Mr. Lasky. There are a great many facts that are set forth in these contracts, and it is necessary to read the contracts. You should be given an opportunity to read them.

The Witness: I have it now. It was $25,000.00 upon execution of the agreement; $25,000.00 on the day following date of release of any motion picture made pursuant hereto. The commitment was then for $50,000.00. [90]

Mr. Harkins: Read it.

The Witness: "* * * if said motion picture is released at a date earlier than eighteen (18) months from the date of the signing of this agreement. If said motion picture is not released on or before eighteen (18) months from the date of this agree-

(Testimony of Jesse L. Lasky.)

ment, then the sum mentioned in this sub-section (b) of Paragraph VII of this agreement shall be due and payable eighteen (18) months from the date hereof provided, that should said sum not then be so paid, this agreement and all rights of Lasky hereunder shall cease and terminate (except as such shall theretofore have been fully exercised) and Lasky shall be relieved of all further liability to York hereunder.

"(c) in addition to the foregoing, Lasky agrees to pay to York a sum to equal four per cent. (4%) of the amount by which the gross receipts from the distribution of each motion picture as may be made hereunder shall exceed three million dollars; an amount equal to five per cent. (5%) of the amount of gross receipts from the distribution of each motion picture as may be made hereunder shall exceed four million dollars; a sum equal to six per cent. (6%) of the amount by which the gross receipts from the distribution of each motion picture as may be made hereunder shall exceed six million dollars; and eight per cent (8%) of the amount by which the gross receipts from the distribution of each [91] motion picture as may be made hereunder shall exceed nine million dollars."

The Court: And that document is what?

Mr. Harkins: Exhibit 1A of the stipulation of facts, Pages 7 and 8.

Q. (By Mr. McLane): My question was whether that related to the option—I still don't understand

(Testimony of Jesse L. Lasky.)

what the $25,000.00 was for. Was that for the option to purchase Sergeant York's life story?

A. I think it was payment——

The Court: What was?

The Witness: I would have thought it was for the purchase. The contract would describe it. These long contracts——

The Court: Did you make up yourself the schedule attached to the income tax return which is before you, and which is Exhibit F?

The Witness: No. I have a secretary who makes it up and keeps my accounts. And he consulted with the tax accountants.

The Court: Your secretary wrote in the return the description thereof the $25,000.00?

The Witness: Yes, that I am sure of.

The Court: What counsel had in mind was this. You agreed under a written agreement with Sergeant York, which [92] is Exhibit 1A in this proceeding, to pay Sergeant York $50,000.00 for all the rights that he was giving you to the story.

The Witness: Right.

The Court: You paid him at sometime $25,000.00 and agreed to pay him the balance of $25,000.00 at a certain time. You have just read that provision in Exhibit 1A.

Now, on your return for 1940 there is a notation of payment of $25,000.00 to Sergeant York—to get to the point of this, what is really in question here—is whether the $25,000.00, which is described as payment for option in the return, is the same $25,-

(Testimony of Jesse L. Lasky.)

000.00, which is the amount paid and referred to in the contract with Sergeant York.

The Witness: It is the same, I am sure.

The Court: Did you pay Sergeant York, or was Sergeant York eventually paid $50,000.00?

The Witness: Yes.

The Court: Now, was Sergeant York paid $25,000.00 in addition to that $50,000.00?

The Witness: No.

The Court: Does that clear that up?

Mr. McLane: No. I would like to know who paid the second $25,000.00.

The Court: Doesn't that appear——

Mr. Harkins: Warner Brothers. We will stipulate [93] that they assumed the obligation to pay it.

Q. (By Mr. McLane): In other words, you didn't get the option from Sergeant York. He entered into the final contract of sale, is that correct?

A. We paid $25,000.00 as provided by the contract.

Q. You say "We"?

A. I paid $25,000.00 as provided by the contract. When Warner Brothers took over the contract, they took the obligation to pay the second $25,000.00. On the other hand, the reason it was called an option—I think I can explain that. There was a possibility that if the time elapsed, I think, and we wouldn't execute our portion, my part of the agreement, I think the rights reverted back to Sergeant York, didn't they?

Mr. Harkins: The contract speaks for itself.

(Testimony of Jesse L. Lasky.)

The Court: Yes.

Mr. Harkins: That is why they might have called it an option in the income tax——

The Court: But the agreement also will show whether the word option was used in the agreement.

Mr. McLane: The question was directed to the issue of whether or not the $25,000.00 option was contained in the agreement.

The Court: I think you have run into a matter that [94] raises some ambiguity about a payment of $25,000.00. You ran into that because of a schedule attached to an income tax return.

Now, you didn't run into the word option in the agreement which is received in evidence as Exhibit 1A, did you?

Mr. McLane: That is right.

The Court: Will you please ask your next question.

Q. (By Mr. McLane): Will you please turn to the first two items of income on that income tax return, Mr. Lasky.

Mr. Harkins: Which return are you referring to?

Mr. McLane: 1940. He only has one, I believe.

Mr. Harkins: You entered into evidence the return for 1942.

Mr. McLane: That is 1940, which has been marked for identification and not offered.

The Court: Exhibit 6. Since you are going to refer to it so much I am going to ask you to put it into evidence.

(Testimony of Jesse L. Lasky.)

Mr. McLane: I would like to offer that income tax return for 1940 marked Exhibit F for identification in evidence as Respondent's exhibit next in order.

The Court: Any objection?

Mr. Harkins: No objection.

The Court: It will be received in evidence as Exhibit F.

(The document heretofore marked Respondent's Exhibit F was received in evidence.) [95]

At this time we will take a recess for the reporter. During the recess, I would like to confer with both counsel in the chamber with all of the exhibits. We have a little mechanical difficulty. The Court does not have copies of all the exhibits. I must have exhibits before me, and I want to find out if either one of the counsel cannot provide Mr. Lasky with duplicate copies of the exhibits. If you have any duplicate copies will you bring them in, and we will mark the duplicate copies with the exhibit numbers so that the Court can follow by looking at exhibits and also Mr. Lasky will know what the exhibit numbers are when he looks at an exhibit.

(Short recess taken.)

The Court: The hearing will be resumed.

Will you please go ahead, Mr. McLane.

Mr. McLane: May we have the income tax return for 1940, your Honor, Exhibit F. Thank you.

Q. (By Mr. McLane): Mr. Lasky, I hand you an income tax return for 1940, which is now in evidence as Exhibit F and ask you that you return

(Testimony of Jesse L. Lasky.)

to Page 2 and review again the item listed under business expenses.

A. "Expenses account business trip to Los Angeles"——

Q. Just read it to yourself, Mr. Lasky.

Is there a description for that item, relating to expenses incurred for attorney's transportation cost to [96] Jamestown, Tennessee?

A. Yes. It says "With attorney."

Q. Who was the attorney, Mr. Lasky?

A. Peter Bruington.

Q. Is he the attorney for Warner Brothers?

A. No.

Mr. McLane: Is the clerk here, your Honor?

The Court: No.

Mr. McLane: I would like to have marked for identification income tax return for the year 1942 and ask that Mr. Lasky——

The Court: That has already been marked.

Mr. McLane: 1941, I am sorry, your Honor.

The Court: An income tax return for 1941 may be marked for identification as Exhibit L.

(The document above-referred to was marked Respondent's Exhibit L for identification.)

Mr. McLane: I will just write it in in pencil.

Q. (By Mr. McLane): I ask you, Mr. Lasky, whether that is your signature on Page 1 of the return? A. Yes, it is.

Q. Now, I ask you to turn to the schedule of income listed on the first typed sheet on the return,

(Testimony of Jesse L. Lasky.)

which is unnumbered, your Honor, and ask the item of $196,216.80 refers [97] to on that return.

A. They were checks received from Warner Brothers for "Sergeant York."

Q. Were they from the earnings of the picture "Sergeant York"?

A. They were from the gross film rentals.

Q. Did the picture actually earn that much during 1941 for you?

A. It says here "Share of gross film rental from release of 'Sergeant York.'"

Mr. McLane: I would like to offer that exhibit as Respondent's exhibit next in order.

The Court: Any objections?

Mr. Harkins: No objection.

The Court: It will be received in evidence as Exhibit L.

(The document heretofore marked Respondent's Exhibit L was received in evidence.)

[See pages 409-416.]

Q. (By Mr. McLane): Now, Mr. Lasky, I hand you the photostat copy of a check, dated 12-30-41, and ask you to examine it.

Mr. McLane: May we have this marked for identification, your Honor.

The Court: It may be marked as Exhibit M for identification. [98]

(The document above-referred to was marked Respondent's Exhibit M for identification.)

(Testimony of Jesse L. Lasky.)

Q. (By Mr. McLane): I hand you a check dated December 31, 1941, and ask that you examine it.

Mr. McLane: May this be marked for identification, your Honor.

The Court: It will be marked as Exhibit N for identification.

Mr. McLane: N, your Honor?

The Court: Exhibit N.

(The document above-referred to was marked Respondent's Exhibit N for identification.)

Q. (By Mr. McLane): Mr. Lasky, were those amounts received by you in 1941 from what you stated were the earnings of the picture "Sergeant York"?

Mr. Harkins: May I interject here at this point, your Honor. In the stipulation of facts, Page 4, Paragraph 11, we have stipulated that Mr. Lasky received these amounts in 1941. We at least inferentially stipulated they were received for namely with respect to the exhibit the amounts mentioned in Exhibits 4 and 5 of the stipulation of facts.

Mr. McLane: Your Honor, the first paragraph—I don't care to be technical about this—but the first paragraph of the stipulation states,

"The parties to the proceeding hereby stipulate that the following facts are true and may be found as facts by the Court subject to grounds of either party to enter objections on the grounds of relevancy or materiality and the right of either party

(Testimony of Jesse L. Lasky.)

to present other items of proof either related or unrelated to the facts herein stated." [100]

Mr. Harkins: But not inconsistent therewith.

Mr. McLane: I don't think the argument we have inferentially agreed that the items for such and such paragraphs are excepted unless it is stated specifically in the stipulation, because this is one of the more important phases of the government's case we are now entering.

Mr. Harkins: I was unfortunate in the use of the word "inferential."

In the stipulation of Exhibit 4 there is reference to the sum of $200,000.00 and also to the sum of $85,000.00.

In Exhibit 5 of the stipulation of facts there is reference to the sum of $90,000.00. [101]

We have stipulated that these amounts were received and Exhibits 4 and 5 are the best evidence of what they were received for and should not be contradicted by a statement on the 1941 tax return.

Mr. McLane: When I entered into that stipulation in connection with the copies of the exhibit, I had no idea that I would be stipulating part of the case out of court. Had I known that, I doubt whether there would have been any such stipulation submitted. I doubt that that conclusion could be drawn on from the stipulation or the exhibit. I am trying to find out what the nature of these payments were.

Mr. Harkins: I have the originals, and you saw the originals of those two agreements. They are the

(Testimony of Jesse L. Lasky.)

best evidence of what the payments were received for. We have stipulated as to what they were received for.

Mr. McLane: When this stipulation was drawn up, counsel did not have the benefit of other bits of evidence produced by Warner Brothers. I had no notion that this argument would be put forth.

The Court: My ruling at this time is that these matters are not inconsistent. I think we will have to go further to find out whether there is any real inconsistency. The Court will not regard the agreement that these exhibits could be received in evidence as an agreement that the Respondent could not inquire as to how the agreements were [102] carried out.

Now, this has to do with how these agreements were carried out. M and N are checks that were paid to Mr. Lasky. It may be that the checks were paid under the agreement, which is Exhibit 4 or under the Exhibit 5.

I overrule your objection.

Mr. McLane: May I offer these in evidence.

Mr. Harkins: Exception.

The Court: The exception may be noted.

The checks, Exhibits M and N are received in evidence.

(The documents heretofore marked Respondent's Exhibits M and N were received in evidence.)

Q. (By Mr. McLane): I hand you a letter, dated December 18, 1941, and attached therewith is

(Testimony of Jesse L. Lasky.)

a statement entitled "Statement to Jesse L. Lasky, covering distribution of production 'Sergeant York' to November 29, 1941." I ask you whether or not you have ever seen the letter and attached statement before? A. Yes, I must have seen this.

Mr. McLane: May this be marked for identification, your Honor.

The Court: It will be Exhibit O.

The Clerk: May I mark the exhibit, please.

(The document above referred to was marked Respondent's Exhibit O for identification.)

Mr. McLane: I am sorry.

Q. (By Mr. McLane): Mr. Lasky, what is the date of the letter, which is attached to the statement? A. December 18, 1941.

Q. And for what period does the statement—strike that.

Up to what date does the statement cover with regard to the earnings of "Sergeant York"?

A. To November 29, 1941.

Q. On that statement what is the earnings of "Sergeant York" to that date?

A. Gross income from distribution within the United States $1,760,000.00.

Q. What was your share? A. $21,216.00.

Q. Where did the other $175,000.00 come from, Mr. Lasky?

Mr. Harkins: Once again I object. That is shown on the exhibit and the stipulation of facts.

Mr. McLane: Again I am trying to find out

(Testimony of Jesse L. Lasky.)

where the money came from. I don't think any document speaks for itself with regard to that.

Mr. Harkins: It is incompetent and irrelevant.

The Court: Objection overruled.

Mr. Harkins: Exception. [104]

The Court: The exception will be noted.

Q. (By Mr. McLane): Where did the money come from?

A. I made some notes that might help me try to remember some of the affairs of the case.

The Court: You may refresh your recollection from your notes.

Mr. McLane: There is in evidence two letters, one dated December 30, 1941, and the other dated December 31, 1941. I think Mr. Lasky might be able to refresh his recollection by examining those letters.

Mr. Harkins: Those are Exhibits 4 and 5 with the stipulation of facts, to which I have referred.

Q. (By Mr. McLane): Mr. Lasky, Exhibit 5 refers to the sum of $85,000.00 in the third paragraph thereof.

The Court: Now, the question is where did those payments come from. Are you talking about the $85,000.00?

Mr. McLane: And the $90,000.00.

The Court: Those are checks, Exhibits M and N.

Mr. Harkins: If it will help, we will stipulate they came from Warner Brothers, even though the checks purport to be from Producers' Settlement Corporation.

(Testimony of Jesse L. Lasky.)

Mr. McLane: I would like to know what the checks [105] were for.

Mr. Harkins: Permit Mr. Lasky to read Exhibits 4 and 5. I believe he can answer your question.

Mr. McLane: Isn't that Exhibits 5 and 6, rather than 4 and 5?

Mr. Harkins: What?

Mr. McLane: Isn't that Exhibits 5 and 6?

Mr. Harkins: Exhibit 6 is dated April 30, 1942.

The Court: What is your question, Mr. McLane?

Mr. McLane: I am trying to—I want to ask Mr. Lasky for what reason he was paid the $85,000.00 and $90,000.00 in view of the fact that the earnings of the picture were only $210,200.00 some odd dollars, according to the schedule he received, dated November 29, 1941, which ends the last quarter, is that correct?

The Witness: I imagine that is correct, yes.

The Court: Well, Mr. Lasky, Exhibit 4 states that you request Warner Brothers to make a payment to you of $85,000.00 even though the earnings at that time in December of 1941 had reached only $21,216.80. Why did you make that request?

The Witness: I am trying to remember. I know I requested for an advance. I wish I could remember why. There was some compromise or dispute. Frankly, I don't remember. [106]

Mr. McLane: May I see if this will help Mr. Lasky, your Honor.

Q. (By Mr. McLane): You were entitled to

(Testimony of Jesse L. Lasky.)

participate in the gross earnings which exceeded $1,600,000.00 under the original contract, is that correct? A. That is right.

Q. And did the two letters, December 30th and December 31, 1941, which are Exhibits 4 and 5 raise that gross to $2,580,000.00 before you were to participate? A. Yes.

Q. So you received a lump sum of $175,000.00 on December 30th and 31st of 1941 even though the picture had not earned but about $21,000.00, during that year in return for raising gross figure?

A. That is probably what happened.

Mr. Harkins: Your Honor, once again we stipulated to that in the stipulation and these exhibits——

The Court: Your stipulation, Mr. Harkins, is five pages long. It is one of those stipulations we frequently see. It is the usual form of stipulation in which you agree that certain exhibits may be received in evidence without the formality of identification and all of that. That is all you stipulated. There isn't anything in this stipulation of facts about the context of any of these. [107]

Mr. Harkins: The exhibits are included as part of the stipulation of facts, your Honor.

The Court: You have stipulated in Paragraph 11 of your stipulation that Mr. Lasky received in 1941 from Warner Brothers $85,000.00, $90,000.00, and $21,216.80. You referred to the letters of December 30th and December 31, 1941. If the agree-

(Testimony of Jesse L. Lasky.)

ments speak for themselves, they do speak for themselves.

The question asked by counsel may be to remove any ambiguity that there may be in the agreements. I do not know, but there is nothing objectionable to that last question.

Q. (By Mr. McLane): Mr. Lasky, I hand you another statement dated—another letter dated May 6, 1942, attached to the statements from Warner Brothers to Mr. Loyd Wright and a statement to February 28, 1942.

Mr. McLane: May we have that marked for identification.

The Clerk: Exhibit P for identification.

(The document above-referred to was marked Respondent's Exhibit P for identification.)

Q. (By Mr. McLane): I ask you to examine that in the possibility that it may assist you in determining what the payment of $85,000.00 and $90,000.00 were for. [108]

Will you turn to Page 2, Mr. Lasky, of the statement. What was the gross—what was the amount upon which you would be permitted to participate according to that statement?

A. $1,178,978.57.

Q. That was received by subtracting $2,580,000.00 from $3,758,978.57? A. That is correct.

Q. Previous to that time you had been entitled to participate in everything in excess of $1,600,000.00?

Mr. Harkins: Your Honor, I object to that be-

(Testimony of Jesse L. Lasky.)

cause the matter in the record. He is speaking of the letter and statement dated May 6, 1942, and stating that previous to that Mr. Lasky had been entitled to participate in proceeds over $1,600,000.00, which by reason of Exhibits 4 and 5, which are in the record, have been stipulated to. It is quite apparent that by December 31, 1941, the point of participation by Mr. Lasky started at $2,580,000.00.

Mr. McLane: I recognize that these exhibits are in evidence. I am trying to get some continuity of the questions asked. I can't ask him questions, assuming he is familiar and understands the contents of exhibits from memory ten years later.

The Court: Your question refers to the date of May 6, 1942. You say that previous to that date he was entitled to participate in the earnings above $1,600,000.00. [109]

Will you please reframe your question so to overcome that inaccuracy. Between December 30, 1941, and May 6, 1942, he was not to participate in the profits above $1,600,000.00. He would only participate in the profits over $2,580,000.00.

Mr. McLane: Let me save possibly some time.

Q. (By Mr. McLane): Wasn't it the result of this transaction to permit you to discount $25,000.00 of the first $200,000.00 the picture would earn so you could get $175,000.00 in 1941? I can go over these figures item by item if you care to.

Mr. Harkins: I don't know what the transaction is he is referring to.

(Testimony of Jesse L. Lasky.)

The Court: Please read the question.

(The question was read.)

Mr. Harkins: I expand my objection on the grounds that it is entirely outside the issue of this proceeding. We are dealing with the tax year 1942, or the year 1942. A transaction that occurred on December 4, 1942, is entirely immaterial to what happened in 1941. The government has not asserted that Mr. Lasky is taxable on any other income in 1942 than the $805,000.00 he received from United Artists on December 4th.

The Court: Objection overruled.

Mr. Harkins: Exception. [110]

The Court: The exception may be noted.

Mr. McLane: Will the reporter read the question again, please to Mr. Lasky.

The Court: Read the question.

(The question was read.)

The Witness: I don't remember that transaction at all.

Q. (By Mr. McLane): Can you refresh your recollection by looking at the schedule——

Mr. McLane: I hate to belabor this point, your Honor. It is a point that Respondent wants to impress——

The Witness: If I could explain my affairs, my financial affairs were not handled by me at all. I concentrated entirely on stories. I am constantly reading, arguing with screen writers, working long hours——

(Testimony of Jesse L. Lasky.)

Q. (By Mr. McLane): Mr. Lasky——

A. ——consequently, I never paid much attention to my financial affairs, and other people did. Whatever they told me to do, I would automatically do without any examination.

Q. Who told you to do this?

A. If I received or gave out checks, it made no impression whatever. It still doesn't.

Q. It doesn't make any impression if you give up [111] $25,000.00 of $200,000.00——

A. At that time it would have made an impression, of course. At that time I foresaw large earnings. Frankly, I don't remember the circumstances.

Q. W. , will you look at the schedule of February 28th which is marked for identification as Exhibit P and refer to the item under deductions.

A. "Your share of cost of advertising campaign per agreement, dated April 30, 1942.

Q. What is the date of that statement?

A. February 28, 1942.

Q. Yet it refers to an agreement you entered into on April 30, 1942.

Mr. Harkins: May I suggest that there has been so much reference to that that counsel put it in evidence.

Mr. McLane: All right. Respondent offers these in evidence, your Honor, as Respondent's exhibits next in order.

The Court: They will be received in evidence as Exhibits P and O.

(Testimony of Jesse L. Lasky.)

(The documents heretofore marked Respondent's Exhibits P and O were received in evidence.)

[See pages 417-421.]

Mr. McLane: There wasn't any letter attached to either of those two we discussed, was there?

Mr. Harkins: I think it was. The last two or three weren't. [112]

The Court: Counsel asked you if there was some letter attached, do you know?

Mr. McLane: I asked if you attached a letter to these statements. I want to be sure I didn't overlook them. I believe they are in the last two.

Mr. Harkins: I was still taken up with the last question counsel asked. What I am getting at is he had put into evidence this May 6, 1942, letter to which is attached a statement showing receipts as of February 28, 1942. I believe the last question of inquiry is how could that possibly refer to a campaign advertising expense pursuant to agreement of April 30, 1942. I am simply calling attention to the fact that this was mailed under date of May 6, 1942, which is subsequent to the date referred to.

Mr. McLane: All right.

The Court: Well, does Exhibit P have a letter attached to it, Mr. Clerk, or not? Will you look at Exhibit P, and O, please. Is there a forwarding letter?

The Clerk: A forwarding letter with statement attached, your Honor.

(Testimony of Jesse L. Lasky.)

The Court: May I see those. That exhibit speaks for itself.

Mr. McLane: All right, your Honor. I will move on then. [113]

Q. (By Mr. McLane): Mr. Lasky, I hand you a letter dated June 3, 1942, written to a Mr. T. J. Martin and signed by Mr. Loyd Wright and ask whether you have ever seen this letter before.

Mr. McLane: Mr. Wright is in the court room, and probably the proper procedure would be to have it introduced in evidence through Mr. Wright. In order to continue some continuity, and since Mr. Harkins has examined the letter, I am offering it.

The Court: It may be marked Exhibit Q for identification.

The Clerk: Exhibit Q for identification.

(The document above-referred to was marked Respondent's Exhibit Q for identification.)

Q. (By Mr. McLane): Will you read the letter, Mr. Lasky, to yourself, and then I will ask you a question.

Did you instruct Mr. Wright to return that check for $244,529.84 referred to in the letter?

A. I remember this incident. I can tell you what I know. There was a considerable discussion as to the correct accounting of all kinds of items. I consulted Mr. Miller, who is an expert accountant, and who I mentioned yesterday worked for me before.

He was disturbed by the accounting, the foreign accounting, [114] and the question how the pictures

(Testimony of Jesse L. Lasky.)

were being sold to Warner Brothers, that is, by their distributors. There were several very disturbing items.

When the check arrived, it seemed his advice was not to accept it because we would be accepting things we were going to dispute. I, therefore, sent it to my attorney, and this letter says he returns it.

Mr. McLane: May I have this marked for identification, this check dated May 6, 1942, from Warner Brothers Pictures to Jesse L. Lasky.

The Clerk: Exhibit R for identification.

(The document above-referred to was marked Respondent's Exhibit R for identification.)

Q. (By Mr. McLane): I will ask you to examine this check and tell me whether or not you or your legal representative gave a receipt for that check in 1942, prior to December 4th?

A. Yes.

Mr. McLane: I would like to offer the letter marked Exhibit Q and the check marked Exhibit R as Respondent's Exhibits next in order, Your Honor.

Mr. Harkins: No objection.

The Court: Received in evidence as Exhibits Q and R. [115]

(The documents heretofore marked Respondent's Exhibits Q and R were received in evidence.)

[See pages 422-423.]

Mr. McLane: Mr. Harkins, would you also stip-

(Testimony of Jesse L. Lasky.)

ulate that the two other checks and two other financial statements were mailed?

Mr. Harkins: I think this is a proper place to request the Court, or request counsel and the Court to determine the purpose for the offering of this type of evidence. What I have in mind, your Honor, this is a rather vital point to my theory of the case.

Counsel in his opening statement stated that the government in part would rely upon the documents of constructive receipts as one of the theories in the case.

I come back again to my argument, which I have repeated several times, that the notice of deficiency in this case and amended pleadings are pinpointed on one transaction, the receipt of $805,000.00 from United Artists by Mr. Lasky on December 4, 1942, and whether that was a capital gain or ordinary income.

Now, if that money was an income realizing transaction, a taxable transaction, the government might have applied it. The only question is how should it be taken into account. If counsel is offering the present type of evidence and the letters and statements and checks he refers to to establish constructive receipt, then I must object to the material because it is entirely outside of the issues. [116]

How can both the Petitioner and Respondent agree that the December 4th transaction is a tax realizing transaction, and yet permit the government to establish something in the nature of a con-

(Testimony of Jesse L. Lasky.)

structive receipt, for a constructive receipt, although it is a fictitious doctrine, does bring in a tax realizing tax discount.

If this evidence is offered to establish constructive receipt, it is entirely outside of the issues and brings into being another taxable transaction in deficiency, not brought out in the answer, and for that reason we object to the line of evidence.

Mr. McLane: May I state that, as I said in the opening statement, one of the reasons we are saying that Mr. Lasky only assigned ordinary income to United Artists was because—and if you will recall that was in the alternative -he had constructively received five hundred ninety-one thousand some odd dollars during 1941—1942, I am sorry—prior to December 4th, and that even if the Court should find that a capital asset was transferred on December 4, 1942, that it would have to be reduced by the amount which he constructively received during 1942 prior to that date.

And that is one of the major points in our brief.

The Court: Well, if your evidence supported that theory would you file an amended answer, moving to increase the amount of the deficiency? Is that what you have in mind doing? [116-A]

Mr. McLane: Actually, the deficiency would be decreased in the alternative if you accepted the proposal he sold a capital asset on December 4th but reduced by the amount he constructively received.

Our whole theory is based on it all being ordi-

(Testimony of Jesse L. Lasky.)

nary income. But the Petitioner is saying it is a capital gain.

It seems to me Respondent is pleading in the alternative. That is entirely possible. There may have been, although that isn't our position, a construction of a capital asset of a far smaller amount.

Mr. Harkins: The whole trouble is that Respondent has not pleaded in the alternative, and for him to adopt a doctrine of constructive deficiency he would have to abandon notice of deficiency.

I might go on further and say that it is improper cross-examination to bring out a doctrine of constructive receipt. The affirmative of it gives rise to tax consequences. It should have been pleaded in the answer if he intended to rely on it. It should not be brought out on cross-examination, but in direct examination.

Mr. McLane: We said Mr. Lasky received ordinary income in 1941—1942, rather—and that as a result of that he could not transfer to United Artists other than a right to that ordinary income.

Now, if he constructively received some three-quarters, [116-B] whatever the amount is, during 1942, prior to the date when he transferred to United Artists the right to receive $805,000.00, then it seems that in the alternative that the capital gain should be reduced by the amount of five hundred thousand some odd dollars, although I admit candidly this is a please in the alternative, and I so stated in the opening statement.

(Testimony of Jesse L. Lasky.)

In other words, I thought it was my duty in representing the government to cover the issues from every side in the event that your Honor should find that Mr. Lasky did transfer something that was a capital asset that I could show he constructively received three-quarters. Then the asset he transferred was just that much less.

Another reason for offering the statements in evidence, your Honor, is to try to bring out that there was no substantial disagreement between Warner Brothers and Mr. Lasky during 1942. There are letters attached to the statement, which purport to give the reasons for that disagreement. I would like to have them in evidence also, if possible. [116-C]

The Court: We have received in evidence Exhibits Q and R. Were those the last exhibits offered?

You have asked counsel whether he will object to the receipt in evidence of two more exhibits, which have not yet been marked for identification.

Mr. McLane: That is correct.

The Court: And counsel raises a point at this time and asks you to state your purpose of this line of inquiry and the purpose of offering these exhibits.

Now, you have stated your purpose and counsel for the Petitioner raises the point that you are going beyond the scope of the pleadings. You want the Court to rule on that, do you?

Mr. Harkins: Yes, your Honor.

The Court: The Petitioner alleges in general

(Testimony of Jesse L. Lasky.)

that the Commissioner erred in determining the Petitioner received $425,000.00 as ordinary income in the taxable year of 1942. 1942 is involved in this proceeding because of the provision of the current tax act. The year actually before us in 1933.

Mr. Harkins: Yes, your Honor.

Mr. McLane: Your Honor, I am going to further——

The Court: I wonder if you would mind waiting a minute, please, Mr. McLane.

Mr. McLane: Not at all. [117]

The Court: Although the year to be taxed is 1943, all of the taxable items came up in the year of 1942, is that correct?

Mr. Harkins: Yes, your Honor.

The Court: You have a problem here of this sort. The Respondent could have made an affirmative allegation in the answer which, of course, would have put on him the burden of producing some evidence of going forth to sustain the affirmative allegation. He didn't do that, and he is now offering evidence which would provide the basis for amending his pleadings and his answer to conform to the proof.

Now, this matter goes in a circle. Is the Court going to allow him to introduce, to go ahead and introduce evidence and then amend his answer to conform to proof.

Now, the issue is broad, and it is a matter of argument. And it will be argued whether the issue

(Testimony of Jesse L. Lasky.)

is broad enough to include the alternative contention that the Respondent would raise on his brief.

I prefer, Mr. McLane, that you do not rely wholly upon the breadth or scope of the question that is put in issue and that you amend your answer to include the material which you are going to argue. I will allow you to offer evidence with the understanding that you will amend your answer to conform to the proof. Will you do that?

Mr. McLane: Yes, your Honor. [118]

The Court: If you are going to then get over into what would be your case, I think you should draw a line at some point and stop your cross examination and then state that you are going ahead and introduce evidence you think supports the contention that you are going to make under an amended pleadings.

Mr. McLane: All right, your Honor.

The Court: Can you adapt yourself to that ruling?

Mr. McLane: I thought I would go ahead and finish my cross examination on other matters and then come back to this. I have just a few more questions.

The Court: Very well. Then you are going to stop at this point the inquiry into letters and schedules for some other period that would follow Exhibits Q and R, is that correct? Or are you going to take them up now?

Mr. McLane: I could take it up now, your Honor.

(Testimony of Jesse L. Lasky.)

The Court: I want to know whether it is part of your case or whether part of cross examination?

Mr. McLane: I would like to be allowed to make it part of my case and delay it for a minute and then take Mr. Lasky as a hostile witness under Rule 43B.

The Court: I am simply coming back to the question you asked opposing counsel. You asked if he was going to object to your presenting certain evidence. He does object. The Court wants to know if you are going to offer them at [119] this time or not.

Mr. McLane: I would like to.

The Court: You haven't offered them.

Mr. Harkins: I renew my objection.

Mr. McLane: I think there are several I would like to offer in evidence——

The Court: Before you go ahead—it is more of the same we have just had?

Mr. McLane: Yes.

The Court: To what do these exhibits relate?

Mr. McLane: To the amount Mr. Lasky was entitled to in 1942 prior to December 1942 and the checks which were tendered to him in payment thereof.

The Court: Under what agreement?

Mr. McLane: I beg your pardon?

The Court: You said they related to an amount Mr. Lasky was entitled to receive before 1942, and the Court asked you under what agreement?

(Testimony of Jesse L. Lasky.)

Mr. McLane: The first May 1940 agreement, the supplemental agreement, rather, May 15, 1940.

The Court: It seems to me, therefore, that it comes within the scope of cross examination at this time. These exhibits are offered to show how the provisions of the contract were carried out.

Mr. Harkins: I would like a ruling for what purpose [120] they are admitted.

The Court: That is what the Court is trying to find out. You will have to have them marked for identification and make the objection at the time they are offered.

Mr. McLane: Will you mark them for identification as Exhibit S for identification.

The Clerk: Exhibit S for identification.

(The document above-referred to was marked Respondent's Exhibit S for identification.)

The Court: What is that?

Mr. McLane: A letter dated July 10, 1942, to Mr. Loyd Wright from Warner Brothers attached to a statement to Jesse L. Lasky, dated May 30, 1942.

The Clerk: Exhibit T for identification.

(The document above-referred to was marked Respondent's Exhibit T for identification.)

Mr. McLane: Exhibit T is a letter of July 14, 1942, to Mr. Loyd Wright from Mr. R. J. O'Bringer. This will have to be offered at another time. If these go in do you want them all to go in. I might as well make the offer now.

The Clerk: Exhibit U for identification.

(Testimony of Jesse L. Lasky.)

(The document above-referred to was marked Respondent's Exhibit U for identification.)

The Court: I don't think we should mark the exhibit for identification. [121]

Mr. McLane: Mr. Harkins would like, as I understand it, the exhibit to go in if the schedule goes in. Consequently I will offer it at this time.

Mr. Harkins: I am still a little bit uncertain what your Exhibit S and T are.

The Court: Will you please look at them.

Mr. McLane: Here it is. Do you have a description of Exhibit U, your Honor?

The Court: Would you mind waiting a minute, please, until Mr. Harkins looks at S and T for identification.

Have you looked at them, Mr. Harkins?

Mr. Harkins: Yes, I have.

The Court: What is Exhibit U for identification?

Mr. McLane: Exhibit U is a letter dated July 25, 1942.

The Court: From whom?

Mr. McLane: From Mr..... to Mr. R. J. O'Bringer from Loyd Wright.

The Clerk: Exhibit V for identification.

(The document above-referred to was marked Respondent's Exhibit V for identification.)

Mr. McLane: The exhibit is a letter dated October 13, 1940, to Mr. Loyd Wright from Warner Brothers Pictures Inc., and a schedule attached thereto dated August 29, 1942.

(Testimony of Jesse L. Lasky.)

The Court: That is Exhibit V for identification. The [122] letter of July 25, 1942, is Exhibit U for identification?

Mr. McLane: That is correct, your Honor.

The Clerk: Exhibit W for identification.

(The document above-referred to was marked Respondent's Exhibit W for identification.)

The Court: Please don't announce anything until it has been read in the record. We have had nothing about Exhibit W at the present.

Mr. McLane: Exhibit W marked for identification is a letter to Mr. Roy J. O'Bringer, dated October 19, 1942, signed by Loyd Wright.

The Court: That has been marked as Exhibit W for identification.

You are getting ahead of the game, Mr. McLane. Give the description, and I will ask to have it marked for identification.

Mr. McLane: The next is a photostat of the check payable to Jesse L. Lasky, dated July 10, 1942, in the sum of $132,692.78.

The Court: That may be marked Exhibit X for identification.

(The document above-referred to was marked Respondent's Exhibit X for identification.)

Mr. McLane: The next is a check dated October 16, 1952, payable to Jesse L. Lasky in the sum of $193,476.70. [123]

The Court: That will be marked as Exhibit Y for identification.

(Testimony of Jesse L. Lasky.)

(The document above-referred to was marked Respondent's Exhibit Y for identification.)

Mr. McLane: I now offer the exhibit marked for identification as S the letter dated July 10, 1942, and the statement up to May 30, 1942, showing the net results from the distribution of the production "Sergeant York" and the share of Jesse L. Lasky——

The Court: From what period to what period?

Mr. McLane: The last period was February 28, 1942, to May 30, 1942.

Mr. Harkins: I would like to have counsel state for what purpose this is offered.

The Court: I believe the purpose has already been stated.

Mr. Harkins: If it is offered for any other purpose than to show the working out of the May 15, 1940, agreements—if it is offered to establish any theory of constructive receipts, I object to it as being immaterial, outside of the issues, improper cross examination.

Mr. McLane: It is offered to show how the contract provisions were carried out and that a certain amount of money was actually tendered to Mr. Lasky in 1942 prior to December 4th. [124]

The Court: The objection is overruled.

The document marked for identification as Exhibit S is received in evidence as Exhibit S.

[See pages 424-426.]

Mr. Harkins: Exception.

At the same time I would like to repeat my ob-

(Testimony of Jesse L. Lasky.)

jection to each of these exhibits T to Y inclusive if they are offered.

The Court: You have the same objection to those exhibits?

Mr. Harkins: Yes, your Honor.

Mr. McLane: May I offer them as a group, your Honor?

The Court: You may offer them as a group.

The objection is overruled. Exhibits T, U, V, W, X, and Y are received in evidence.

Mr. Harkins: I take an exception to the overruling of the objection.

(The documents heretofore marked Respondent's Exhibits T, U, V, W, X, and Y were received in evidence.)

[See pages 427-433.]

Q. (By Mr. McLane): Now, Mr. Lasky, getting back to the transaction of December 4, 1942, in which you entered into an agreement with United Artists, I want to ask this question. Who did you first approach in United Artists regarding the sale or this transaction—strike the word sale, please.

A. I didn't approach anyone. I asked my attorney [125] Loyd Wright to sell our contractural rights, whatever they were. I didn't approach anyone.

Q. Did you tell Mr. Wright that you wished to do that, or did Mr. Wright tell you?

A. Actually Mr. Miller—I must explain. There were considerable controversies—some monies had been withheld from the checks that we thought were

(Testimony of Jesse L. Lasky.)

unfair. Mr. Miller said, "I would advise you to sell your assets, your rights."

And then I called Loyd Wright, and he agreed that probably Mr. Miller was right.

And I said, "Well, I don't know how to sell them. Will you sell them?"

And he undertook to sell them.

Q. How did you happen to set the figure of $805,000.00 as your price?

A. I don't know that.

Q. Who did fix the price?

A. I imagine that Mr. Wright fixed the price.

Q. Why did you want to sell your rights to receive income from a picture you previously testified was very, very successful?

A. Well, in the first place I had received a letter that had disturbed me very much from Abe Warner in New York in which he asked me to make concessions. I had the feeling that if I didn't make these concessions, I wouldn't be very [126] popular in the studio where I wanted to remain.

There had been discussions about my participating in advertising expense. There is no reason why I should. That wasn't a part of the original understanding or deal.

Nevertheless, to placate Warner Brothers, I did agree to participate in the advertising. There was great concern about foreign returns. In other words, I understood our accounting would be when the returns arrived in New York. But the returns were received in Europe and they could have been spent

(Testimony of Jesse L. Lasky.)

in other directions. At least Mr. Miller so informed me. He was concerned. "If you wait for the returns to come to New York, they may never come."

These various things disturbed me. I felt I would like to get the whole thing settled and in a way that wouldn't further antagonize Warner Brothers and protect me.

I had several conferences with Mr. Miller, and his advice was to sell, if you can get a proper price.

I said to Mr. Wright, "Will you undertake *the* sell the rights for a proper price."

And he finally advised me that $805,000.00 he could get that figure from United Artists. He advised me to accept it.

Mr. McLane: May I have the income tax return for 1942, please, your Honor.

The Court: That is Exhibit C. [127]

Q. (By Mr. McLane): I hand you, Mr. Lasky, Exhibit C which is the income tax return for 1942, and ask you to turn to Page 2 of it—Page 3 of the filled in typed sheets.

I ask you to refer to the item of your legal expense. What is the amount that is listed there?

A. $46,376.80.

Q. To whom was that paid?

A. I would have to get the detail.

Q. Well, generally.

A. Well, generally, Mr. Bruington for his trips to Tennessee and for drawing one of the documents. To Loyd Wright. Those would have been the principal ones.

(Testimony of Jesse L. Lasky.)

Q. Isn't it a fact that you paid $10,000.00 to Mr. Bruington and the remainder to Wright, Wright, Green and Wright?

A. I would think that is right, yes, as I remember.

Q. Did you stop working for Warner Brothers after you transferred these rights to the earnings of "Sergeant York" to United Artists?

A. It is hard for me to remember.

Q. We have a summary of employment record, the photostatic copy——

Mr. Harkins: Exhibits E and K. [128]

Q. (By Mr. McLane): I hand you an exhibit marked Exhibit K, which is a summary of employment record, and ask you to refresh your recollection again and tell us when you ceased being employed by Warner Brothers.

A. There was continuous employment—there was an interval after "Sergeant York" and then there was continuous employment.

Q. There was an interval after "Sergeant York"?

A. There was, maybe some few weeks. It says 4-40 to 5-17.

Q. Then you went back on what date?

A. 5-19 to 6-7-41. Then there was an interval apparently from 6-7-41 to 8-11-41. This must have been a beginning of a new contract, 8-11.

Q. So you remained on the payroll after you transferred these rights to United Artists?

A. No.

(Testimony of Jesse L. Lasky.)

Q. The transfer was December 4, 1942?

A. December 4, 1942. Well, apparently I was there from 8-11-42 to 1-9. I must have been on the payroll.

Q. Then you went back on 8-11-42?

A. That is right.

Q. You were there from 8-11-42 to 1-9-43?

A. That is right. [129]

Q. Did this disagreement between yourself and Mr. Warner affect your relations in the corporation?

A. We felt that the sale of the rights, as far as my association with them, had blown up. There was nothing more to disagree about. Once I didn't own these rights, they couldn't ask any more concessions.

Q. Why should Warner Brothers be concerned when you sold them to a third party?

A. I said they weren't concerned as far as I know.

Mr. McLane: I would like to have marked for identification the schedule from the books of Warner Brothers, relating to entries made on their books every thirty days, showing the accumulative shares to the various participants in the profits of the picture "Sergeant York."

The Court: That may be marked for identification as Exhibit Z.

(The document above-referred to was marked Respondent's Exhibit Z for identification.)

Mr. McLane: May I ask, your Honor, leave that such items in evidence as the income tax returns

(Testimony of Jesse L. Lasky.)

and this photostat be withdrawn and have copies made and submit them to the Court at a later date. We just received them on Friday.

The Court: Yes.

Q. (By Mr. McLane): How often did Warner Brothers compute the amount of [130] earnings, which the various participants were entitled to, in the profits of "Sergeant York" from that schedule?

A. My recollection is every three months.

Q. Just looking at this schedule——

The Court: That is a schedule from Warner Brothers' office?

Mr. McLane: Yes, that is correct. I am going to——

The Court: Are you going to have any witness testify about these schedules?

Mr. McLane: Yes.

The Court: How would Mr. Lasky know about the internal workings of Warner Brothers?

Mr. McLane: I was going to ask him if he had ever seen it and then drop it if he had not.

The Witness: I never saw it.

The Court: You stated that you have never seen it?

The Witness: No.

The Court: The accounting record put before you?

The Witness: No, never.

Q. (By Mr. McLane): Mr. Lasky, did you receive in 1943 from Warner Brothers the approximate sum of $93,000.00 in salary?

(Testimony of Jesse L. Lasky.)

A. If that schedule shows it, I did. I wouldn't remember what I received in 1943 unless you——

Q. That is a general figure. That comes pretty close [131] to it.

Mr. McLane: I offer this income tax return——

Mr. Harkins: My objection goes to the year 1943. It is not before us.

The Court: Why are you going into 1943?

Mr. McLane: In 1943 and 1944, during those years Mr. Lasky continued in the employ of Warner Brothers, and there was good relationships between them, and the inference from that being there was no substantial disagreement in 1942.

Mr. Harkins: I object to the inference but I have no objection to stipulate he did continue in the employ of Warner Brothers and received a salary as shown by the exhibit submitted.

The Court: The record is clear now on the point of your objection.

You may answer the question, if there is an unanswered question.

Mr. Reporter, will you read the record.

(The record was read.)

The Court: We do not have an unanswered question.

For the record the general objection is now overruled.

Mr. McLane, we do not have in evidence any return for 1943, do we?

Mr. McLane: No, we do not. [132]

The Court: And so if you are going to go into

(Testimony of Jesse L. Lasky.)

the matter of income received in 1943, unless you are going to stipulate about it, you will have to take that up later. I think I had better inquire at this time. Have you made a stipulation that the Petitioner received $93,000.00 salary for anything else from Warner Brothers in 1943?

Mr. Harkins: I will stipulate there was received what is shown by the summary payroll record which you have.

The Court: I haven't received Exhibit Z in evidence, and your stipulation doesn't work out very well, because you are referring to an exhibit that hasn't been received in evidence.

Mr. Harkins: I am referring to Exhibits E and K.

However, I will stipulate that Mr. Lasky received from Warner Brothers in 1943 $92,966.67 as compensation for services.

The Court: $92,966.67. That is a little less than $93,000.00. Were you using a rough figure, Mr. McLane?

Mr. McLane: Yes.

The Court: All right. Do you so stipulate?

Mr. McLane: I do.

The Court: That is the stipulation then in the record.

Mr. McLane: That is for 1943?

The Court: 1943. [133]

Mr. McLane: Will you stipulate for 1944 as to the figure of $61,050.00?

Mr. Harkins: I so stipulate.

(Testimony of Jesse L. Lasky.)

The Court: That isn't very clear, gentlemen, I am sorry. You stipulate what?

Mr. McLane: Will you stipulate that Mr. Lasky received the amount I just referred to during the year 1944 as salary from Warner Brothers?

The Court: And the amount is $61,050.00.

Mr. Harkins: I so stipulate.

The Court: That is the stipulation.

Mr. McLane: That is all, your Honor.

The Court: That concludes your cross examination?

Mr. McLane: Yes, your Honor.

The Court: We will now recess for lunch. It is twenty minutes to one. Perhaps you want to have a little longer time. I have been allowing an hour. Would 2:15 p.m. be satisfactory?

Mr. Harkins: Yes, your Honor.

The Court: Well, 2:00 p.m. I think would be all right.

We will recess until 2:00 o'clock.

(Whereupon, at 12:40 p.m., a recess was until 2:00 p.m. of the same day.) [134]

Afternoon Session—2:00 p.m.

The Court: Proceed.

Mr. McLane: If it is possible, your Honor, Respondent would like to call Mr. Roy O'Bringer out of turn so that he may return to his work at Warner Brothers.

The Court: If it is agreeable.

Mr. Harkins: It is agreeable.

The Court: This witness is for the Respondent, I understand, and we are hearing him before the Petitioner has rested, but you have no objection, Mr. Harkins.

Mr. Harkins: That is correct.

Mr. McLane: It is for the convenience of Mr. O'Bringer. This witness is being called for the limited purpose of identifying certain documents which were subpoenaed from the books and records of Warner Brothers.

The Court: Will you swear the witness.

Whereupon,

ROY JOHN O'BRINGER

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, sir.

Please state your name and address for the record.

The Witness: Roy John O'Bringer, 100702 Toluca Avenue, Hollywood. [135]

Direct Examination

Q. (By Mr. McLane): Would you state your present occupation?

A. Resident attorney of Warner Brothers Pictures, Inc.

Q. Did you on behalf of Warner Brothers receive the subpoena requiring the production of certain documents during the last two weeks?

(Testimony of Roy John O'Bringer.)

A. I did.

Q. Did you also receive a copy of a subpoena requiring the production of certian other documents, which was served in the New York office of Warner Brothers Pictures, Inc.? A. I did.

Mr. McLane: May we have marked for identification these two schedules. I think they should be marked as 1.

The Court: They may be marked as Exhibit AA.

Mr. McLane: That is tentatively marked Exhibit S for identification. Have you another one——

The Court: This is already marked for identification, why mark it again?

Mr. McLane: It is already marked Exhibit S. I wanted to have the schedule attached—I think that has been marked in the same manner. I believe it is a continuation of the same schedule.

The Court: Very well. The supplement to Exhibit S is marked Exhibit S, and that will be part of it. [136]

Q. (By Mr. McLane): Mr. O'Bringer, I show you two photostatic copies, marked Exhibit S and ask whether or not they are copies obtained from the books and records of Warner Brothers Pictures Inc.?

A. Well, I would say these are the copies of statements received by me from our New York office pursuant to a subpoena served upon the New York office.

Mr. McLane: Your Honor, at this time I would like to offer in evidence Exhibit S.

(Testimony of Roy John O'Bringer.)

Mr. Harkins: May I see it, please. Your Honor——

The Court: Is this the right time to offer these in evidence? You called this witness out of order. You had them marked for identification during the cross examination of Mr. Lasky.

Now, if these have been identified, you may want to offer them at some other time. This witness has been called for the sole purpose of identification. Have you any questions about the identification at this time?

Mr. Harkins: No. That is what I was going to state. I am willing to stipulate that these are the records of Warner Brothers books in New York. I have no objection as to foundation or not the best evidence or anything of that nature. But I wouldn't want to commit myself that they are accurate representations of Mr. Lasky's share of the [137] distribution, because as a matter of fact, they contradict amounts in exhibits already introduced over my objections.

But if Mr. O'Bringer is here solely for the purpose of identifying these documents as being Warner Brothers records, then I will be willing to stipulate that without further committing myself.

The Court: Are you going to ask this witness anything about the contents of these sheets?

Mr. McLane: No, your Honor.

The Court: All right. Offer it later, please.

Mr. McLane: May we have them marked for identification.

(Testimony of Roy John O'Bringer.)

The Court: That will be Exhibit AA.

(The document above-referred to was marked Respondent's Exhibit AA for identification.)

Mr. McLane: It is a contract dated December 22, 1942, between Warner Brothers and United Artists Corporation.

Mr. Harkins: What was the date?

Mr. McLane: It is dated December 22, 1942, between Warner Brothers and United Artists.

I would like to have marked a copy of a voucher sheet, No. 43792, dated 12-22-42.

The Clerk: Exhibit BB for identification.

(The document above-referred to was marked Respondent's Exhibit BB for identification.)

Mr. McLane: I would like to have marked a check from Warner Brothers to United Artists, dated December 22, 1941, in the amount of $820,000.00.

The Clerk: Exhibit CC for identification.

(The document above-referred to was marked Respondent's Exhibit CC for identification.)

Mr. McLane: I would like to have marked a notation from the books of Warner Brothers, dated December 22, 1941.

The Clerk: Exhibit DD for identification.

(The document above-referred to was marked Respondent's Exhibit DD for identification.)

Mr. McLane: Will you stipulate, Mr. Harkins, that these are all authentic copies——

Mr. Harkins: I don't believe I have seen them.

(Testimony of Roy John O'Bringer.)

Mr. McLane: ——from the books of Warner Brothers? If so, we can let Mr. O'Bringer go.

Mr. Harkins: I will stipulate that they are Warner Brothers' records without a further identification or foundation and reserve the right to object to their admission for other grounds.

I will stipulate that this is a correct copy of a contract between United Artists and Warner Brothers with the same reservation. I will object to its being offered in evidence.

Mr. McLane: Am I correct, Mr. Harkins, that you do not agree to the authenticity of the various schedules that were introduced in evidence regarding the statements made to [139] Mr. Lasky? They were November 29, 1941, and February 28, 1942, and May 30, 1942, and August 29, 1942.

Do you care to have these identified by Mr. O'Bringer?

Mr. Harkins: I agree they were the statements that were sent to Mr. Wright. And the line of objection was not on the ground they weren't correct copies of statements.

Mr. McLane: That is all, your Honor.

The Court: You are excused. Thank you for appearing in this Court.

(Witness excused.)

The Court: Is there anything further before Mr. Lasky takes the stand again?

Mr. McLane: No.

The Court: You may take the stand again, Mr. Lasky.

Whereupon,

JESSE L. LASKY

called as a witness for and on behalf of the Petitioner, having been previously duly sworn, resumed the stand and testified further as follows:

Redirect Examination

Q. (By Mr. Harkins): Mr. Lasky, on cross examination you testified as to the date you acquired title to the "Mark Twain Story" but you were rather general as to the exact time. Have you [140] refreshed your recollection as to the date of acquisition of the "Mark Twain Story"?

A. I did, and I forgot again.

Q. Do you have a copy of the agreement of assignment and purchase? I believe you have it here.

A. This is something else. I think it is there.

Q. Here it is.

A. Yes. I remember. The 11th day of July 1941.

Q. Why did you acquire the "Mark Twain Story"? What purpose did you have in mind?

A. Well, it happened I knew the lawyer in charge of the estate. I knew him quite well. At various times, at lunch in the private dining room, there were discussions about doing something about Mark Twain. I said to Jack Warner I believed I could make a very good deal, as I knew them personally. I think they had previously tried to get it, and the terms were high.

With that brief talk I went to New York and

(Testimony of Jesse L. Lasky.)

sure enough had no trouble in acquiring the rights. They did say in New York that they would like me to produce it. I had made quite a study of Mark Twain. The estate felt responsible to the family that it should be handled carefully.

At any rate, I purchased the story and came back to Warners and sold it to them.

Q. On direct examination you testified at various points [141] in your career you acted as producer. We will start with the period with the Pickford-Lasky Company. What was your status with the Pickford-Lasky Company?

A. Well, I was either president or vice-president and the producer.

Q. What was your salary? A. $1,500.00.

Q. A what? A. A week.

Q. Now, your next employment you testified was as a producer for RKO Pictures from November 1936 to March 1938. What was your salary as producer, if you recall?

A. I think it was $1,750.00. I made a note of it. RKO, $1,750.00 a week.

Q. Your next employment was as producer of the radio program "Gateway to Hollywood" you testified? A. Yes.

Q. What was your salary on that program?

A. $1,750.00 a week.

Mr. Harkins: May I have Exhibits P, T, and V. They would be the accounting statements.

The Court: Have you Exhibit P marked for identification?

(Testimony of Jesse L. Lasky.)

Mr. Harkins: Here it is, your Honor. [142]

Q. (By Mr. Harkins): Mr. Lasky, I show you Exhibit P and request you to read the first sentence.

A. "As requested by Mr. Jesse Lasky, we are enclosing herewith statements showing the income from distribution from the production 'Sergeant York' domestic and foreign from February 28, 1942, together with your share thereof.

"Also enclosed herewith is check payable to Jesse L. Lasky in the amount of $244,529.00 covering the amounts shown by the statement to be due."

Q. Mr. Lasky, this is a letter from Warner Brothers to Loyd Wright, which states, "As requested by Mr. Lasky, we are enclosing statement and check." Did you request Warner Brothers to send your statements and check to Mr. Wright?

A. Yes, I did.

Q. What was the reason, if any, you had for that request?

A. Well, first they withheld $10,000.00 under a claim by the Author Skeyhill. I think probably they thought there was some plagiary. That had nothing to do with me, I felt, or the gross receipts, and I objected to it.

That was one of several other incidents, and finally on several occasions they would ask me for certain modifications.

I am not very good at saying no, so I asked them to [143] send everything to Loyd Wright, the check,

(Testimony of Jesse L. Lasky.)

and any future requests to make them to Loyd Wright. That is how the check was sent.

Q. I call your attention to the schedule attached to Exhibit P. It is labeled "Schedule A" and the note at the bottom. Will you read the note, please.

A. "The sum of $10,000.00 has been withheld at this time for the reason of the claim of the alleged Skeyhill heirs."

Q. I call your attention to Exhibit S, the schedule A attached thereto and ask you to read this statement, appearing on this schedule.

A. "Payment: amount withheld this time by reason of claim by alleged Skeyhill heirs, $10,000.00."

Q. I call your attention to Exhibit V, the schedule A attached thereto, and ask you to read this statement appearing thereon.

A. "Amount paid to public administrator to estate of Tom Skeyhill in connection with the assignment referred to in letter dated July 31, 1942, signed by Jesse L. Lasky and addressed to Warner Brothers Pictures, Inc., $239.75."

Q. Is that the Skeyhill claim that you refer to?

A. That is the claim, yes.

Q. Prior to July 31, 1942, did you consent to Warner Brothers' withholding that payment from your participation? [144] A. I did not.

Q. In connection with the accountings received from Warner Brothers, did you consult anyone other than Loyd Wright in regard to them?

(Testimony of Jesse L. Lasky.)

A. Yes, Mr. James Miller.

Q. Who is Mr. Miller?

A. He is an accountant, member of a firm of accountants in New York. He had previously examined my statements at the Fox Film Company in 1932, 1933, and 1934.

Q. In what connection did he examine the Fox' statements?

A. Well, I had a percentage clause, percentage of the profits. And he examined them to ascertain if the accounting was correct, if they were charging their own theatres the proper amount and matters of that kind.

Q. Did you consult Mr. Miller in connection with the Warner Brothers' contract on the same basis?

A. On practically the same basis, yes.

Q. Did he actually audit Warner Brothers' records?

A. He recommended—I am not sure he made an audit—he recommended he either make an audit or we settle the amount or sell the contract.

Q. Did you file any sort of litigation against Warner Brothers with respect to the accounting to you of the proceeds of the picture "Sergeant York"? [145]

A. No.

Q. Did you consult an attorney with respect to such a suit or litigation?

A. I consulted Loyd Wright, yes.

Mr. Harkins: That is all, your Honor.

(Testimony of Jesse L. Lasky.)

Recross Examination

Q. (By Mr. McLane): Did I understand that you then gave up your rights to the profits in a tremendously successful picture because of a $239.00 item?

Mr. Harkins: Your Honor, it is my fault, but I have forgotten one question.

The Court: Will you give way, Mr. McLane?

Mr. McLane: Certainly.

Mr. Harkins: Mr. Lasky, in your testimony you have twice referred to the acquisition of the story "The Great Caruso," which occurred subsequent to the period involved in this litigation. Did you acquire the story "The Great Caruso" with your own funds?

The Witness: No, with the corporation funds.

Mr. Harkins: What corporation?

The Witness: Jesse L. Lasky Productions, Inc.

Mr. Harkins: Was title to the picture taken in the name of yourself or the corporation.

The Witness: In the name of the corporation.

Mr. Harkins: That is all.

Mr. McLane: I didn't have an answer to my last question, your Honor.

The Court: Will the reporter read the question again.

(The question read.)

The Court: Is that your question, Mr. McLane?

Mr. McLane: Yes, it is, your Honor.

The Court: Where is the $239.00 item?

Mr. McLane: The $239.75 is the item referred

(Testimony of Jesse L. Lasky.)

to in Exhibit P. I am sorry, your Honor. It is not referred to in Exhibit P. It is in Exhibit V probably.

The Court: Will you show it to the witness, please.

Mr. Reporter, will you read the question again for Mr. Lasky.

(Question read.)

The Witness: I can't answer yes or no. We decided to sell the contract actually even before this item. I would like to repeat.

First I had a letter asking me to adjust the whole contract by some $600,000.00. Then Mr. Miller, who was to do the accounting, called my attention to the foreign receipts. That the receipts would be received in Europe. That they could dispose of the receipts and never give us an accounting in New York. So that they would never get a [147] true statement of my share of the gross proceeds.

Then he questioned the fact that the Warner Brothers were selling "Sergeant York" to their own theatres, were they getting a proper rental.

More important than that, they were taking lesser pictures, and inferior pictures, and using "Sergeant York" as the decoy to sell the lesser pictures.

It disturbed me very much. I didn't like the idea of employing him to audit the books. I was in the studio working for Warner Brothers. I wanted all the peace possible.

He said the alternative is to either sell, make a

(Testimony of Jesse L. Lasky.)

settlement with Warner Brothers for a lump sum, or to sell out, to sell to someone else.

I consulted Loyd Wright and told him I would like to sell. He agreed that maybe it was the sensible thing to do.

I thereupon notified Warner Brothers to communicate to him any further requests regarding adjustments or concessions or anything of the kind. That he was hired for that purpose.

Q. Do you have a letter in your possession, referring to the $600,000.00, which Warner Brothers asked you to——

A. I haven't got the letter, but I have seen it.

Mr. McLane: That is all, your Honor.

The Court: Are there any further questions?

Mr. Harkins: That is all, your Honor. That is all Mr. Lasky.

The Court: Do you wish Mr. Lasky to remain?

Mr. Harkins: I think he will of his own volition, your Honor.

The Court: Yes.

Mr. Harkins: Mr. Wright.

Whereupon,

LOYD WRIGHT

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, sir.

Will you state your name and address for the record.

The Witness: Loyd Wright. My home address

(Testimony of Loyd Wright.)

is 336 South Hudson, Los Angeles. My office is 111 West 7th Street, Los Angeles.

The Court: Have you Exhibit V, Mr. McLane?

Mr. McLane: Exhibit P, your Honor?

The Court: Exhibit V.

Mr. McLane: I don't seem to find it here, your Honor.

Direct Examination

Q. (By Mr. Harkins): What is your occupation? [149] A. Attorney at law.

Q. Do you represent Jesse Lasky?

A. I do.

Q. How long have you represented him?

A. Since on or about 1932 or 1933, somewhere in there.

Q. Do you represent other people connected with the motion picture or theatrical industry?

A. I do.

Q. Could you estimate, approximately, the extent of your practice, involving the motion picture and entertainment field?

A. Well, since 1915 when I was admitted, a substantial part of my brother's practice, with whom I went in 1915, was motion picture business.

Then when I returned from the war and went back with him, he died in 1924, and I took over then such corporations as the Triangle Film Corporation, D. W. Griffith, Thomas Ince, Charlie Chaplin. And since then I have represented at various times a great number of them.

Q. Have you represented, and do you represent

(Testimony of Loyd Wright.)

individuals of prominence in the motion picture field? A. I have.

Q. Would you name some of them.

A. Yes. D. W. Griffith individually; Thomas Ince, Mary Pickford, Douglas Fairbanks, Gary Cooper, Gloria Swanson. [150]

Q. Mr. Wright, Exhibits P and S and V, if it is available——

The Clerk: It is right there.

Q. (By Mr. Harkins): Exhibits P, S, and V are all letters from Warner Brothers to you, stating that they are enclosing accountings with respect to the picture "Sergeant York," and also enclosing checks payable to the order of Jesse L. Lasky.

Did Mr. Lasky authorize you to receive these accountings and these checks? A. He did.

Q. Did he state any reason or was—let me say it this way. Was it at your insistence or advice that this was authorized?

A. I think it was as the result of my suggestion to him.

Q. What were the reasons for the suggestion?

A. The reasons were that I had learned that Mr. Lasky was prone to be a good fellow and give up contractural rights and always—I was in the east a good deal during this time, consulting with Jim Miller.

And it was our joint opinion that we ought to be very careful to watch the accountings and protect Mr. Lasky against himself. He had previously, without our knowledge, made an adjustment at the

(Testimony of Loyd Wright.)

insistence of Warner Brothers on [151] the base at which he would participate. And we didn't wish him to do anything at least without our having a chance to counsel with him.

Q. Mr. Wright, I call your attention to Exhibits R, X, and Y, representing checks from Warner Brothers Pictures Inc., and producer's settlement corporation payable to the order of Jesse L. Lasky, with the accompanying vouchers and stamped "void."

Can you recall if you received the originals of those checks? A. I did.

Q. What did you do with them?

A. I returned them after discussing the matter with Mr. Lasky. He asked my opinion whether he should accept them and I told him no. That it was in my opinion that the legend on the vouchers would preclude him from demanding an adjustment were we to find he was entitled to additional monies.

Q. What adjustment do you have in mind that he would be precluded from, if any?

A. Well, experience had taught me that in the business, particularly the field men of the distributors and these kind of contracts, used a successful picture to sell a less desirable picture. And the percentages would be adjusted in favor of pictures wholly owned by the corporation, where no one else had a percentage. [152]

That frequently those houses owned, built by the distributor or affiliated companies, would get better terms, than those houses owned by someone else.

(Testimony of Loyd Wright.)

That very frequently wholly owned pictures were given the selected dates, whereas pictures in which there was an outside interest were given the poor dates.

They had already indicated enough to put us on record or on notice when the first check came through.

The trade journals carried estimated grosses that were way above that which was reported officially to Mr. Lasky. The discussions in the trade came to Mr. Lasky through friends at Warners and elsewhere. It came to me that they were dogging on the release of this picture. And consequently, I felt that we should give them enough time so that when we decided to move in and do our investigating, we could ask, as I had done in some other instances, uncover where there was thousands of dollars due if they had lived up to the terms of the distribution contract.

Q. Did Mr. Lasky consult with you with respect to instituting either an audit or a litigation in respect to the contract? A. He did.

Q. What was your advice to him?

A. My advice to Mr. Lasky was to wait until there was as broad a distribution as possible so that there would be a [153] big enough field to put our investigators to pick out our houses and our contracts and the reports. And Mr. Miller could investigate the records in New York.

Q. I have previously called Mr. Lasky's attention to Exhibit P, S, and V, and the reference

(Testimony of Loyd Wright.)

therein to the claim of the Skeyhill heirs. Does that convey anything to you?

A. Well, that was one sign that they were trying to take from Mr. Lasky's share of monies that they shouldn't have taken. And we had the foreign situation, too, that was bad.

Q. What do you mean by the foreign situation?

A. Well, under the contract, the foreign monies were not to be reported until they were received in New York in dollars. During the war years, much of that territory was completely closed. Dollars were not sent over. All companies were making great efforts to use those impounded funds, if they could safely do so, to make pictures.

We heard rumors and stories that they were using this money to buy goods and engage in commerce. We didn't know. We couldn't do much about it until time elapsed and we could have some definite record.

We were fearful—I was fearful that they might exploit these funds, lose them, or perhaps if they could make pictures, Mr. Lasky's money would finance a picture. They would get the returns, and he wouldn't participate. And I don't believe that was contemplated when the contract was made.

Q. Did Albert Warner's assistant Mr. Shindler —what is the man's name? A. Snyder.

Q. What is Mr. Snyder's position with Warner Brothers Pictures?

A. Well, he is an executive. I don't know what his title is. He runs the New York office.

(Testimony of Loyd Wright.)

Q. Did he make any specific proposal with regard to withholding sums from Mr. Lasky's participation for foreign blocked funds?

A. Yes. He proposed $200,000.00 be withheld at one time.

Q. Was that proposal conveyed to you?

A. Yes.

Q. What did you do upon hearing about it?

A. Well, I said no. They weren't entitled to do that. I don't know whether I took that up directly with Mr. Snyder or Mr. Harry Warner. But upon that information being conveyed to me, I complained to somebody.

Q. Does it refresh your recollection that in November of 1942 you made a trip to New York?

A. Yes.

Q. At that time did you talk to Mr. Albert Warner? A. I think it is Abe——

Q. Abe Warner—— [155]

A. Abe Snyder and Albert Warner. Yes, I had a conference with both of the gentlemen, discussing the various things that we had heard about the treatment of the picture. And in that conversation something was said about the suggestion that they withhold these funds.

Q. Mr. Wright, you handled the details of Mr. —Mr. Lasky testified you handled the details of the sale of his interests in the picture "Sergeant York" to United Artists Corporation? A. I did.

Q. Was United Artists the only potential seller that you got in touch with? A. Buyer.

(Testimony of Loyd Wright.)

Q. Buyer.

A. No. There were three altogether.

Q. Will you name them, please.

A. Warner Brothers, Mr. Adolph Zukor, and United Artists.

Mr. Harkins: That is all, Your Honor.

Mr. McLane: I have just a few questions, Your Honor.

Cross Examination

Q. (By Mr. McLane): Were you a partner in the law firm of Wright, Wright, Green & Wright during all of 1942—or am I [156] misstating the firm's name?

A. No. In 1942 it was Wright & Millikan in association.

Q. You were a partner in this firm during all that year?

A. I have been the senior partner.

Q. Do you recall your law firm receiving a fee of approximately $36,000.00 from Jesse Lasky during 1942?

A. We received a fee of approximately a net, I think, of around $30,000.00 in that year.

Q. Was that fee received for legal work, relatting to the transfer by Mr. Lasky to United Artists of the right to participate in the percentage earnings of "Sergeant York"? A. In part.

Q. Did you give Mr. Lasky legal advice relating to that transaction of December 4, 1942?

A. I did.

Q. Mr. Wright, were you individually, or was

(Testimony of Loyd Wright.)

your firm, paid legal fees in 1942 for legal work performed as legal consultant for United Artists Corporation?

A. United—yes, we had been West Coast counsel for—I don't know—a number of years.

Q. Were you secretary-treasurer of United Artists during 1942?

A. I have been secretary-treasurer off and on. I don't [157] know. Probably, I was.

Q. Which member of your firm did the work for United Artists on the contract between Mr. Lasky and United Artists?

A. That I don't know. It would be either Mr. Coldwater or Mr. Millikan.

Q. Was Mr. Green a partner in the firm at that time? A. Yes.

Mr. McLane: May I have marked for identification a contract of sale between United Artists Corporation and Warner Brothers, Inc., dated December 22. I am sorry, it has been marked.

Q. (By Mr. McLane): I show you a contract of sale, marked Exhibit AA, Mr. Wright, and ask whether or not your firm represented United Artists in the transfer of the rights under that contract to Warner Brothers on December 22, 1942?

A. No. We had nothing whatever to do with it.

Q. You mean United Artists had other legal advice other than yourself?

A. That is handled in the New York office. I never had seen it. I had no knowledge of it until after it was accomplished.

(Testimony of Loyd Wright.)

Mr. McLane: That is all, Your Honor. [158]

Redirect Examination

Q. (By Mr. Harkins): Mr. Wright, does your law firm have a New York office? A. No.

Q. Where was the contract between Mr. Lasky and United Artists with respect to the sale of the picture "Sergeant York" negotiated?

A. New York.

Q. Who represented United Artists in that transaction? A. Edward Raffery.

Q. Is Mr. Raffery an attorney? A. Yes.

Mr. Harkins: That is all, Your Honor.

The Court: Mr. Wright, I have a few questions. Perhaps you can give the Court some information about this. Mr. Lasky has referred to a Mr. Jim Miller. I am not clear who he is other than he is an accountant who specializes in motion picture accounting.

Is he employed by Warner Brothers, or was he employed by Warner Brothers?

The Witness: No. Mr. Jim Miller is an accountant, who used first to be with his father-in-law, Mr. West. Perhaps, Your Honor will remember that Mr. West was the first certified public accountant who developed the technique of [159] becoming an expert witness.

Mr. Jim Miller followed that system, and he was the expert witness for the oil companies in the Madison trial. We have used him in many motion

(Testimony of Loyd Wright.)

picture matters. The expert witness fact I simply throw in to identify him to Your Honor.

He is a certified public accountant and has a very large firm.

I had used him in similar situations in years past. I think I might state that we never engaged Mr. Miller to investigate a distribution contract but what he uncovered substantial moneys due the producer.

The Court: Mr. Jim Miller is an expert public accountant, who is engaged in his own business?

The Witness: That is right.

The Court: And he is engaged independently in business. You have previously engaged him in certain matters not connected with the Lasky case?

The Witness: That is right.

The Court: And did you consult with Mr. Jim Miller about this "Sergeant York" contract?

The Witness: I did.

The Court: But you did not engage Mr. Jim Miller to make an investigation of accounting that Warner Brothers was following under the contract?

The Witness: Yes, I did engage him to make an investigation. We were trying to time it at the time he and I thought would be best to uncover what we expected existed. And at that time, when we started the negotiations, the idea of the sale developed.

The Court: Did he make any investigation?

The Witness: Only a cursory examination of the

(Testimony of Loyd Wright.)

various statements that were sent with the checks. So far as——

The Court: The statements that you or Mr. Lasky had received under the contract?

The Witness: Yes.

The Court: He didn't make any investigation of the Warner Brothers' books?

The Witness: No, he did not go into Warner Brothers and actually start his investigation.

The Court: Now, with respect to Mr. Raffery, the record will not be clear on that. Mr. Raffery is an attorney for whom? For whom was he counsel?

The Witness: Mr. Raffery's firm, O'Brien, Driscoll & Raffery, have been for many years chief counsel for United Artists. Mr. Raffery, in addition to being chief counsel, became president of United Artists. He was both president and chief counsel at the time of this transaction.

The Court: That is, the transaction of the transfer [161] of Mr. Lasky's contract rights to United Artists?

The Witness: The sale of the property, yes.

The Court: You say he was chief counsel for United Artists at that time. To what extent did he participate in the negotiations leading up to the contract under which Mr. Lasky transferred his interests in the "Sergeant York" picture to United Artists?

The Witness: He is the only one with whom I negotiated for United Artists.

(Testimony of Loyd Wright.)

The Court: He represented United Artists, and you represented Mr. Lasky?

The Witness: That is correct.

The Court: And Mr. Raffery is located in New York.

The Witness: He was in New York.

The Court: You say that the transfer of Mr. Lasky's interests to United Artists was negotiated in New York?

The Witness: It was.

The Court: Well, that is cleared up now. Thank you.

Mr. Harkins: I have a few more questions. May I ask them?

The Court: Certainly, Mr. Harkins.

Q. (By Mr. Harkins): Mr. Wright, did you offer Mr. Lasky's contractual rights in "Sergeant York" to Adolph Zukor? [162] A. Yes.

Q. What price did he offer?

A. We asked Mr. Zukor what he would pay. He offered $800,000.00.

Q. Did you make a similar offer to Joseph Schenck?

A. I had forgotten. I believe—I don't think Joe ever made a positive offer. If he did, it slipped my mind.

Mr. Harkins: That is all, Your Honor.

Mr. McLane: One more question, Your Honor. When Mr. Zukor offered $800,000.00, do you have any notion at all where he happened to get that figure?

(Testimony of Loyd Wright.)

The Witness: No, I don't.

Mr. McLane: That is all.

The Court: Any further questions, gentlemen? May Mr. Wright be excused?

Mr. Harkins: He may.

The Court: Thank you for giving your testimony to the Court, and I am sorry you had to wait so long.

Mr. Wright: Thank you very much, Your Honor. I apologize for disrupting the Court with my cold, but I can't help it.

The Court: I am sorry you had that trouble.

(Witness excused.)

The Court: Now, are you going to call another witness? [163]

Mr. Harkins: No, Your Honor.

The Court: Do you rest?

Mr. Harkins: I rest.

Mr. McLane: The Respondent has no more witnesses. But certain documents have not been offered in evidence which have been identified and authenticated by Mr. O'Bringer——

The Court: Before you proceed that, let me check with the Clerk now on what exhibits have been marked for identification but have not been offered and received in evidence.

The Clerk: My list shows AA, BB, CC, and DD.

Mr. Harkins: What about Exhibit Z?

The Clerk: I thought I said Exhibit Z.

The Court: Everything before Exhibit Z has been received in evidence?

The Clerk: They appear to be, Your Honor.

Mr. Harkins: Exhibit Z is what?

The Court: That is an exhibit consisting of two schedules.

Mr. McLane: I now offer in evidence the exhibit marked for identification as Exhibit Z for the purpose of showing the amounts of the earnings from the picture "Sergeant York" which on the books of Warner Brothers, as of November 29, 1942, showing the amounts of earnings which Mr. Lasky was entitled to at that date. [164]

The Court: Now, may I see that exhibit, please. May I ask you this question. This is the document that was produced under subpoena?

Mr. McLane: That is correct.

The Court: And this is entitled "Warner Brothers Pictures, Inc., Summary of Participation, Share of Income from Distribution of Photoplay 'Sergeant York'" and the participation of Jesse L. Lasky. The dates are set forth as column headings, the first being total, August 29, 1942.

Then—I won't read it into the record. Counsel can look at it.

The second page of this exhibit shows other detail.

Mr. McLane, you should do this for the Court and save the Court the effort of doing it. I would like you to state for the record what parts of that exhibit you are particularly interested in. There are several pages. There is a considerable amount of detail. I believe that in some columns you have Warner Brothers total gross receipts from distribu-

tion in the United States and then somewhere else you have the participants' share, which would be Mr. Lasky's share.

Now, what are you interested in that exhibit?

Mr. McLane: We are interested in the column headed November 28, 1942, showing that Mr. Lasky was entitled to receive $822,857.56 as of that date.

The Court: That is the chief thing you are interested in that exhibit?

Mr. McLane: Yes, it is, Your Honor.

The Court: Do you have an objection to that, Mr. Harkins?

Mr. Harkins: I objected to the introduction of the exhibit, Your Honor, for the reason that we can't possibly concede that those are correct figures, because all along Mr. Lasky was objecting to their accounting. Moreover, the figures shown on those exhibits as being his share of the participation, as broken down in quarterly dates, conflicts with the statements already in evidence as Exhibits P, S and V, which Warner Brothers sent to Mr. Lasky, saying your participation is so much.

The Court: You may recognize very readily that the Court is not aware at this time of the discrepancies, or conflicts in figures between the proposed exhibit and some other exhibit.

Mr. Harkins: That is right.

The Court: The Respondent is relying on Exhibit *E* as establishing a figure of $822,857.56. You note that the figure is in conflict with a figure set forth in some other exhibit. I would like to have that pointed out before I rule on the admissibility

of Exhibit Z, if you can do that now. Otherwise, I will take a short recess, and let you [166] locate the other exhibit.

Mr. McLane, do you know whether the Petitioner, Mr. Lasky, ever received the schedules, which you are offering as Exhibit Z?

Mr. McLane: No, I do not.

The Court: These are accounting sheets which came out of the books of Warner Brothers, Inc.?

Mr. McLane: That is right.

The Court: Apparently, according to the testimony of Mr. O'Bringer, these records are kept in New York City.

Mr. McLane: That is correct. We requested that they be made out to save the Government the expense of a witness.

Mr. Green: May I interpose the further objection to the introduction of the proposed document. Those records were prepared by Warner Brothers. They were subpoenaed out from Warner Brothers' records. There is no showing that they were ever presented to counsel or that Mr. Lasky ever examined them or ever seen them. Further, those records contain accountings for a period of several months after the previous accountings that had been furnished to Mr. Lasky, bearing in mind, that Warner Brothers only furnished him quarterly statements. And this accounting record here goes beyond a period of time any accounting records that were ever furnished to Mr. Lasky. [167]

The Court: What is the last date covered by an accounting record that was furnished to Mr. Lasky?

Mr. Harkins: August 29, 1942. That would be Exhibit V, the schedule attached to it.

The Court: May I see the exhibit and the schedule attached. May I see Exhibit Z.

Mr. McLane: May I ask if counsel has discovered any discrepancies in the figures?

Mr. Harkins: Well, the one sheet tied in with the statement, but you have so many sheets that cover other material.

The Court: Well, Schedule A attached to Exhibit V is a recapitulation or a digest or a resume or something of the sort of material that is on Exhibit C.

It doesn't—for example, the first column on Exhibit—I mean Exhibit Z, contains some figures, which appear on Schedule A attached to Exhibit V as of the date of August 29, 1942.

Such figures as do appear on Exhibit V and Exhibit Z, which are supposed to be the same items, are the same, are they not? I don't find any discrepancy in the two reports, do you? I find several of these figures, looking across from Exhibit V to Exhibit Z——

Well, now your objection originally was that Exhibit Z conflicted with some figures set forth in another exhibit. [168] Do you find those conflicts, Mr. Harkins?

Mr. Harkins: No, I have not been able to find the conflicts.

The Court: All right. Now, did Mr. Lasky receive an accounting at about the same time he entered into an agreement to transfer all of his rights

in the "Sergeant York" picture to United Artists?

Mr. Harkins: He did not.

The Court: Did he ask for it?

Mr. Harkins: It wouldn't be due in the normal course of events until about one or two months after. For example, the accounting as of February 28th was received on about May 16th.

The Court: What is the date of the agreement between Mr. Lasky and United Artists?

Mr. Harkins: December 4th. The accounting for May was received July 14th. The accounting for August was received October 13th. So there was one and a half or two months lag.

Mr. McLane: May I interject a word. The Exhibit Z marked for identification shows that Warner Brothers kept accountings during periods of about twenty-eight to thirty days. So it would show the amount due about thirty days prior to November 29th. That would bring it up considerably beyond August 29th. [169]

The Court: The objection to Exhibit Z is overruled.

Exhibit Z is received in evidence as Exhibit Z.

(The document heretofore marked Respondent's Exhibit Z was received in evidence.)

[See pages 434-438.]

Mr. McLane: Respondent now offers in evidence as Respondent's Exhibit next in order marked Exhibit AA, a contract between United Artists Corporation and Warner Brothers Pictures, Inc., dated December 22, 1942, purporting to transfer from United Artists to Warner Brothers Pictures all of

the rights acquired by United Artists from Mr. Lasky on December 4, 1942.

Mr. Harkins: We object. It is entirely immaterial what United Artists did with the rights after they received them from Mr. Lasky. It has no bearing on this case.

Mr. McLane: The purpose is to substantiate Respondent's opening statement that there was basically an arrangement between Warner Brothers and United Artists—I am sorry—between Warner Brothers and Jesse Lasky——

Mr. Harkins: On the state of the record, that is purely an inference. We believe it is beyond the issues in this case, and I so object.

The Court: On that point you would be relying entirely upon Exhibit AA. You have not called any witness in connection with that. [170]

Mr. McLane: No. Mr. Wright testified that the agreement was entered into in New York, and that the representatives of United Artists were in New York at that time. We have no opportunity to talk to anybody from United Artists.

Mr. Green: If the Court please, Mr. McLane is confused about the two documents. Mr. Wright was referring to the contract between Mr. Lasky and United Artists Corporation and not the contract between United Artists and Warner Brothers.

Mr. McLane: I showed Mr. Wright this exhibit, as I recall. It was marked for identification at the time, and he stated that he had never seen it before. This is a part of the Respondent's proof that the agreement between—that actually what took place

was a discount arrangement between Mr. Lasky and Warner Brothers and that——

The Court: What does the agreement show——

Mr. McLane: The agreement shows——

The Court: ——with respect to dollar amounts?

Mr. McLane: It shows that Warner Brothers purchased from United Artists for the sum of $820,000.00 the same rights which Mr. Lasky had conveyed to the United Artists for $805,000.00.

The Court: The objection on grounds of materiality is overruled. The exhibit will be received in evidence as Exhibit AA. [171]

Mr. Harkins: Exception.

The Court: The exception will be noted.

(The document heretofore marked Respondent's Exhibit AA was received in evidence.)

[See pages 439-444.]

Mr. McLane: Respondent now offers Exhibit CC——

The Court: The next exhibit is Exhibit BB.

Mr. McLane: I am sorry, Your Honor. Exhibit BB, a copy of a voucher taken from the books and records of Warner Brothers Pictures, Inc., showing a payment of $820,000.00 to Warner Brothers Pictures, Inc. on December 22, 1942, as consideration for the contract, which has just been placed in evidence.

The Court: Payment by whom?

Mr. McLane: By Warner Brothers.

The Court: To whom?

Mr. McLane: To United Artists.

Mr. Harkins: We object on the ground of immateriality.

The Court: The objection is overruled. The Exhibit is received in evidence as Exhibit BB.

Mr. Harkins: Exception.

The Court: The exception will be noted.

(The document heretofore marked Respondent's Exhibit BB was received in evidence.)

Mr. McLane: Respondent now offers as Respondent's [172] exhibit next in order a check from Warner Brothers Pictures, Inc. to United Artists Corporation, dated December 22, 1942, in the amount of $820,000.00. It is marked Exhibit CC.

Mr. Harkins: The same objection.

The Court: Objection overruled.

Mr. Harkins: Exception.

The Court: The exception will be noted. The exhibit is received in evidence as Exhibit CC.

(The document heretofore marked Respondent's Exhibit CC was received in evidence.)

Mr. McLane: Respondent offers as Respondent's exhibit next in order a memorandum from the books of Warner Brothers to which attached a short note entitled "Royalties Payable, United Artists Corporation." It is dated December 22, 1942.

The Court: Does that exhibit explain the transactions covered by the last three exhibits?

Mr. McLane: Yes. We introduce it for the purpose of characterizing royalties payable to United Artists Corporation.

The Court: Where did you get that notation?

Mr. McLane: From the books of Warner Brothers. It was produced under subpoena.

The Court: It is a photostatic copy. Have you had a chance to examine that, Mr. Harkins? [173]

Mr. Harkins: I don't know what it refers to. I am going to object on the grounds of materiality, and being outside of the evidence. There is no evidence that the so-called royalty agreement doesn't relate to something entirely foreign.

Mr. McLane: The dates I think, Your Honor, will connect up very well.

Mr. Harkins: You have admitted in evidence a contract whereby United Artists—Warner Brothers purchased certain rights from United Artists. You have admitted in evidence a check——

The Court: Well, I think, for the record, Mr. McLane, you ought to point out what your understanding is of the connection between this notation, Exhibit BB, and any of the preceding Exhibits AA, BB, or CC.

Mr. McLane: We will withdraw that, Your Honor.

The Court: I don't understand why counsel do that. They go so far and take up our time. You may not withdraw it. You have taken up the time of the Court. You offered it, and now the Court wants you to complete it. I want to know why you offered it, and if you are going to offer it, I want to know how you connect it with the other exhibits.

Mr. McLane: It connects with the other exhibits in so far as the amount of $820.000.00. It is related

to the check paying United Artists $820,000.00——

The Court: What exhibit is that?

Mr. McLane: That is Exhibit CC.

The Court: Do you see any reference on Exhibit DD, anything on Exhibit DD, that refers to Exhibit CC? There is some small figures down on the left side of the Exhibit DD. There is a mechanical page stamp on Exhibit DD that has a date on it.

Mr. McLane: Your Honor, they don't tie in with the voucher numbers of Exhibit BB. The exhibit does relate to the agreement, dated December 22, 1942, between Warner Brothers Pictures and United Artists. That is Exhibit AA. The reference is only to that agreement, Your Honor.

The Court: And you objected to it, Mr. Harkins?

Mr. Harkins: Yes, the objection is on the grounds of materiality, outside the issues, and that the agreement is already admitted in evidence and is the best evidence as to what was paid and received for the transaction of December 22, 1942.

The Court: The objection is sustained. The minute sheet will show that there is no Exhibit DD.

Is there anything further?

Mr. McLane: Nothing further, Your Honor.

Mr. Harkins: Nothing further, Your Honor.

Mr. McLane: May I ask——

The Court: What? [175]

Mr. McLane: ——whether or not Your Honor would consider it appropriate in this case to take simultaneous briefs from Respondent and Petitioner, if it is possible?

The Court: The present rule of the Court is to

ask for simultaneous briefs, and sometimes counsel ask for leave to file seriatim or alternative briefs.

You want to file your briefs under the rule?

Mr. McLane: Yes, Your Honor.

Mr. Harkins: I would like sixty days, Your Honor, if possible.

The Court: Kindly work out the date for the briefs, Mr. Clerk, and allow sixty days for the first brief and thirty days for the reply briefs.

The Clerk: Those dates will be February 11th, and March 12, 1951.

The Court: Does that seem to be satisfactory, gentlemen?

Mr. Harkins: It is, Your Honor.

Mr. McLane: Fine, Your Honor.

The Court: That concludes the trial of the proceeding in the matter of Mr. Jesse L. Lasky.

Counsel may withdraw such exhibits as they need to withdraw for photostating and give the Clerk a receipt. But kindly return the exhibits to the Court within two weeks.

The Court has an extra copy of the stipulation. [176] Will you please check over the papers on your desk and return to the Clerk any of our exhibits that you may have.

We will take a recess for a few minutes before reaching the next case.

Thank you, gentlemen. It has been a pleasure to hear this proceeding.

(Whereupon, at 4:00 o'clock p.m., Tuesday, December 11, 1951, the hearing in the above-entitled matter was closed.) [177]

[Endorsed]: T.C.U.S. Filed Jan. 4, 1952.

The Tax Court of the United States

Docket Nos. 26396-26397

BESSIE LASKY-JESSE L. LASKY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS

Courtroom No. 2, Internal Revenue Service Building, Washington, D.C. January 21, 1955.

Met, pursuant to adjournment, at 10:00 a.m.

Before: Hon. Marion J. Harron, Judge.

Appearances: Robert Ash and Carl F. Bauersfeld, Esqs., 1921 Eye Street, N.W., Washington 6, D.C., on behalf of Petitioner. Rollin H. Transue, Esq., (Hon. Daniel A. Taylor, Chief Counsel, Internal Revenue Service), on behalf of the Respondent. [179]

The Clerk: Docket 26397 and 26397, Bessie Lasky and Jesse L. Lasky.

Will counsel please state their appearances.

Mr. Ash: Robert Ash and Carl F. Bauersfeld, for the petitioners.

Mr. Transue: Rollin H. Transue, for the respondent.

The Court: You may proceed.

Mr. Bauersfeld: If the Court please, this case comes before the Court as a result of an order of December 13, 1954.

The Court: I know that.

Do you want to proceed right away and call your witnesses?

Mr. Bauersfeld: We will call our witnesses.

Mr. Sears, will you take the witness stand?

Whereupon,

GRADWELL SEARS

was called as a witness and after having been first duly sworn was examined and testified as follows:

The Clerk: Please state your name and address for the record.

The Witness: Gradwell Sears.

The Clerk: I didn't get the address.

The Witness: Harrison, New York. [180]

Direct Examination

Q. (By Mr. Bauersfeld): Mr. Sears, what is your business? A. I am retired.

Q. Prior to your retirement what was your business?

A. I was president of the United Artists Corporation.

Q. For how long were you president of United Artists Corporation?

A. Approximately three years.

Q. From what date, sir?

A. About June of 1947 until June of 1950.

Q. And prior to becoming president of United Artists what was your position?

A. I was executive vice president in charge of worldwide distribution.

Q. For United Artists?

(Testimony of Gradwell Sears.)

A. For United Artists.

Q. And prior to going with United Artists what was your position?

A. I was president of the Vitagraph Corporation, which is a wholly owned subsidiary of Warner Brothers and the distributing facilities of Warner Brothers. I distributed Warner Brothers Pictures throughout the United States and possessions.

Q. When did you leave Warner Brothers and go to United Artists? [181] A. October 1941.

Q. Did you, as president of the Vitagraph Corporation have anything to do with the distribution of the picture Sergeant York? A. I did.

Q. What did you have to do with it?

A. Just that. I had complete charge of the distribution of Sergeant York in the theaters in the United States and possessions.

Q. Was that a successful picture?

A. Highly successful.

Q. Do you know Jesse L. Lasky?

A. I do.

Q. Are you familiar with the fact that the United Artists Corporation purchased Mr. Lasky's rights in the picture Sergeant York?

A. I am.

Q. Were you consulted about the purchase of Mr. Lasky's rights in that picture?

A. I was.

Q. Will you please tell us in your own words what you did regarding that purchase?

A. I can truthfully say that I instigated the pur-

(Testimony of Gradwell Sears.)

chase of Mr. Lasky's rights in Sergeant York by United Artists. I had been the distributor, as I have previously testified, of [182] Sergeant York and I had opened the picture in the Astor Theater in New York and other key engagements around the country. I knew the picture was a highly successful picture. As a matter of fact, I used the information that I had received in distributing that picture in the distribution of United Artists' pictures. As far as the terms and the business done by the picture and the length of run, and so forth, so along—I would say, the summer or spring—I know it was in the summer anyhow — I had heard——

The Court: Have you answered the question? The witness should not go beyond the scope of the question, and he should not testify about hearsay matters.

Mr. Bauersfeld: Yes, your Honor.

Q. (By Mr. Bauersfeld): The question was: Will you please tell us in your own words what you did regarding the purchase? How did you know Mr. Lasky's rights were for sale?

A. As I just started to say before the Judge interposed an objection, I had heard that Mr. Lasky was dissatisfied with the way the picture was being distributed, more particularly to the Warner theaters. I didn't get this information from Mr. Lasky. I got it from several sources. I believe one was someone connected with Warner Brothers. I made the suggestion to our Mr. Raftery that I thought

(Testimony of Gradwell Sears.)

it would be a good investment for us to buy Mr. Lasky's interest in the picture, if Mr. Lasky [183] was unhappy with it.

Q. Who is Mr. Raftery?

The Court: You better spell the name for the reporter.

Mr. Bauersfeld: R-a-f-t-e-r-y.

The Witness: Mr. Raftery is a partner in the law firm of O'Brien, Driscoll, Raftery, Newton, and Lawler, I believe. Not Newton, it is something else. It is the old firm of O'Brien, Driscoll, and Raftery, and it has several other partners.

Q. (By Mr. Bauersfeld): Did Mr. Raftery have any connection with the United Artists in December 1941?

A. He was the president.

Q. Why did you recommend to Mr. Raftery that United Artists Corporation purchase the rights of Mr. Lasky?

A. I recommended that for two reasons: without being facetious, dollars and cents. I knew that the picture was an enormous success. I thought we could buy it somewhere around $750,000, Lasky's rights, and I thought they were worth over a million. I recommended that we get a hold of Lasky or at least Lasky's attorney and see if we could not work out a deal for the purchase of his rights. That was subsequently done.

Q. Did I understand from your testimony, Mr. Sears, that you were with United Artists at the time you made this recommendation?

(Testimony of Gradwell Sears.)

A. I was.

Mr. Bauersfeld: You may inquire. [184]

Cross Examination

Q. (By Mr. Transue): Do you purchase pictures, Mr. Sears, or how are pictures acquired?

A. How are they acquired?

Q. Yes. Were you the one that made the acquisition or would they be considered by a committee?

A. No. I don't think there was any committee involved. Raftery was the president and I was the executive vice president. I believe the board of directors approved the purchase. That is my recollection of it.

Q. To whom did you talk in regard to the acquisition of Sergeant York? A. To Raftery.

Q. Did you talk to anybody else about the acquisition of the picture?

A. I possibly did. I don't recall anybody specifically. I possibly talked to Arthur Kelly.

Q. Who is Arthur Kelly?

A. Arthur Kelly was one of the vice presidents. He was Mr. Chaplin's personal representative from around 1915 until several months ago.

Q. Who owned the picture Sergeant York at that time? A. Warner Brothers.

Q. Did you talk to anybody in Warner Brothers about [185] acquiring their interest in the picture?

A. No. I recall one of the executives of Warner Brothers discussing with me at the time the picture was shipped from California to New York, lament-

(Testimony of Gradwell Sears.)

ing the fact that Warner Brothers didn't own the picture in its entirety because it was such a wonderful picture.

Q. Did you ever talk to Jesse L. Lasky in regard to acquiring his interest?

A. I did not, no.

Q. Your objective, then, was to acquire the Warner Brothers interest, is that right?

A. No.

Q. What interest did you have?

A. I had heard that Mr. Lasky was unhappy with the distribution of Warner Brothers. I knew from advance information that Warner Brothers would very gladly acquire the entire rights of this thing if they became available.

Q. That Warner Brothers would acquire the rights? A. Exactly.

Q. I thought Warner Brothers had the rights to the picture?

A. Not entirely, no.

Q. What interest didn't they have?

A. I assume they had the majority interest and Lasky had a minority interest. [186]

Q. Did anybody else have any interest in the picture? A. Not to my knowledge.

Q. You don't know whether Sergeant York had an interest in the picture or not?

A. I don't know what Lasky's arrangements were with Sergeant York, no.

Q. Did you ever see the contract between Warner Brothers and Lasky?

(Testimony of Gradwell Sears.)

A. I did not, no.

Q. You indicate that you could acquire the rights of the picture for $750,000 in the spring or summer of 1942, I take it? A. That is right.

Q. What did you expect to acquire for $750,000?

A. Lasky's rights to Sergeant York.

Q. Just Lasky's rights?

A. That is all.

Q. You hoped to acquire them and you never talked it over with Mr. Lasky?

A. I did not.

Q. That was just a hope and a wish on your part that you might be able to acquire the property for $750,000 as far as it pertained to his interest?

A. I think any negotiations are a hope and wish until they are concluded.

Q. United Artists later acquired Mr. Lasky's interest [187] in this picture?

A. That is right.

Q. With whom did you conduct those negotiations?

A. I didn't conduct any negotiations.

Q. You had nothing to do with the acquisition of the picture?

A. No, I had nothing whatever to do with the acquisition of the picture.

Q. What is the purport of the testimony which you are offering here this morning?

Mr. Bauersfield: If the Court please, what the purport of it is for the Court to decide. The Court has heard the witness. I don't think he has to state

(Testimony of Gradwell Sears.)

now what his purpose in stating what he stated was.

The Court: Do you want to reframe your question?

Mr. Transue: I believe, your Honor, this witness has merely testified to hearsay matters. His testimony is no aid to the Court or anybody else.

Just that somebody had hoped to acquire an interest in the picture and hoped to be able to acquire it for $750,000. The man personally conducted no negotiations looking toward the acquisition of that interest. I don't see where his material has any relevancy to any issue that I see in this case.

I move that his testimony be stricken.

The Court: I will let it stand and give it whatever [188] weight it is entitled to receive.

Anything further?

Mr. Transue: No further questions, your Honor.

The Court: Thank you. You may step down.

Mr. Bauersfeld: May the witness be excused at this time?

The Court: Yes. Mr. Sears, you are excused from further attendance.

(Witness excused.)

Mr. Bauersfeld: Mr. Miller.

Whereupon,

JAMES D. MILLER

was called as a witness and after having been first duly sworn was examined and testified as follows:

The Clerk: Will you please be seated? State your name and address.

(Testimony of James D. Miller.)

The Witness: James D. Miller, Bronxville, New York.

Direct Examination

Q. (By Mr. Bauersfeld): Mr. Miller, what is your profession?

A. I am a certified public accountant.

Q. How long have you been a certified public accountant? A. About 30 years.

Q. Have you had any experience in handling accounting [189] problems of the movie industry?

A. Yes.

Q. Will you state some of that experience?

A. We have done some tax work for artists and producers and corporate executives, that is, executives of motion picture companies, and the companies themselves.

We have audited production costs. We have audited distribution costs. We have audited distribution itself. We have worked in litigation, including anti-trust suits that were instituted against the motion picture industry. We have worked with attorneys in the formation of motion picture companies. We have worked with attorneys in connection with the drawing of contracts for artists and producers, writers and technical men.

Q. Do you know Jesse L. Lasky?

A. I do.

Q. How long have you known Mr. Lasky?

A. I think about twenty-five years.

Q. Have you ever performed any professional services for Mr. Lasky? A. Yes.

(Testimony of James D. Miller.)

Q. Did you perform any professional services or were you consulted by Mr. Lasky in connection with the motion picture Sergeant York? A. Yes.

Q. What was the nature of your services or consultation?

A. Those services extended over a period of time. They started in July, 1941. That was the time that the picture had its premiere in New York. Mr. Lasky came on from California to attend that premiere and arrange for it.

While he was here, he was also working on another picture that was to follow, Mark Twain. I met with him and we discussed that matter. He was also negotiating or about to negotiate a three-year extension of his employment contract with Warner Brothers.

In connection with these matters he asked me to review the three contracts that he had with Warner Brothers and also the contract that Sergeant York himself had entered into with Jesse Lasky.

Q. In reviewing the contracts of Mr. Lasky which were dated in May, May 15, 1940, and May 8, 1940, did you consider that those contracts were all related?

A. No. There were two contracts, I believe, dated May 15. One I believe was referred to as a supplemental contract. Those two, as I recall, were related, but not the contract of March, the earlier one, dated May 8, 1940. That was an employment contract.

Q. Now, when Mr. Lasky consulted you when he

(Testimony of James D. Miller.)

came on about these contracts, what did you advise him upon your review of them? [191]

A. I pointed out to him some ambiguities in the contracts and some inconsistencies. I also told him that as a result of our experience in auditing the distribution of motion pictures for other producers and artists that he had better watch rather carefully the distribution of the picture and check the statements very carefully. He was supposed to receive quarterly statements from Warner Brothers showing the results of distribution.

Q. Do you know if Mr. Lasky ever received statements showing the quarterly distribution?

A. Yes, he did.

Q. Did you have occasion to consider those statements?

A. Yes. He consulted with me and sent me the first statement he received. That was a statement covering the period from the time the picture was released initially in July, 1941, down to the end of November, 1941.

When I say the end of November, Warner Brothers had a way of accounting on a weekly basis. So it was not the end of the calendar month, but it was what they considered to be the end of November, 1941.

That statement was received by Mr. Lasky in December, several weeks after the close of the period, and he sent the statement on to me, and asked me for any comments I might have.

(Testimony of James D. Miller.)

Q. Upon the receipt of that statement, what did you advise? [192]

A. His referring that statement to me also related to a letter that he had received from Albert Warner, who was treasurer of Warner Brothers. That letter was written in November, 1941.

The Court: Do we have that letter in evidence?

Mr. Bauersfeld: We do not at this time, your Honor. I was going to ask the witness to identify it.

Q. (By Mr. Bauersfeld): I hand you a letter and ask you to identify it.

A. This is the copy of the letter written by Albert Warner to Jesse Lasky, dated November 24, 1941, which copy Mr. Lasky sent to me.

Mr. Bauersfeld: May this be marked for identification as Petitioner's Exhibit——

The Witness: I might add that letter consists of one page. What you handed me was several pages.

Mr. Bauersfeld: Yes.

The Court: Petitioner's last exhibit number is 7. The last exhibit was joint 7-B, I believe. This may be marked for identification as Petitioner's Exhibit 8.

(Petitioner's Exhibit No. 8 was marked for identification.)

Q. (By Mr. Bauersfeld): I hand you, also, another letter and ask you if you can identify it. [193]

A. Yes. This is a copy of a letter written by Jesse Lasky to Albert Warner in reply and is dated December 4, 1941.

(Testimony of James D. Miller.)

Q. Is that the copy that was sent to you?

A. Yes.

Mr. Bauersfeld: I ask that it be marked as Petitioner's Exhibit No. 9.

The Court: It may be so marked.

(Petitioner's Exhibit No. 9 was marked for identification.)

Q. (By Mr. Bauersfeld): Upon the receipt of the statements and those letters what did you advise, Mr. Miller?

A. I want to point out, first of all, that these letters precede my statement that Mr. Lasky received in connection with an accounting for the distribution of the picture, Sergeant York.

Up to that time, he had not received any accounting whatever from Warner Brothers, although the picture had opened as early as July 1941. Of course, the first run of a picture is by far the most important part.

So consequently, Mr. Lasky was uneasy. He expressed himself to me in that manner. Then on top of that came this letter from Albert Warner, dated November 24, 1941, asking him to change his arrangement.

Under the arrangement that he had with Warner Brothers, [194] he was to receive a percentage of the gross film rentals after the picture had earned from domestic distribution $1,600,000. He was asked by Albert Warner to raise that to $2,300,000. In other words, he was being asked to make a concession of about $125,000, when it became apparent

(Testimony of James D. Miller.)

that the percentage arrangement would be effective.

Q. What did you advise in regard to his acceptance of Mr. Warner's proposal?

A. As a matter of fact, I advised him to consider it.

Q. After Mr. Lasky received the statement that you spoke of as of the end of November, 1941, and after you had reviewed it, what did you advise?

A. At the time the first statement was received, which was the latter part of December, 1941, it was at this time that the newspapers were carrying an account that this picture was the biggest box office attraction of the year 1941; that it had already grossed $4 million; that it was rated by the critics generally as being among the ten best of the year. In other words, the first statement that Mr. Lasky received from Warner Brothers showed gross film rentals from distribution in the United States of just slightly over $1,700,000. It showed no foreign distribution whatever and no income as yet from Canada was being accounted for.

Q. So upon the receipt of that statement what were your conclusions? [195]

A. My conclusions were that there should be an audit of the distribution. I didn't recommend that he make an immediate audit. As a matter of fact, I suggested that the audit be deferred. I urged him to take the advice of his attorney and let him decide when would be the proper time for the audit.

Q. What would have been some of the factors

(Testimony of James D. Miller.)

that you would have taken into consideration in making that audit?

A. The most important factor would be to note its distribution in theaters owned or controlled by the producer itself, that is, Warner Brothers. Warner Brothers at that time owned or controlled over 500 theaters. Most of them were first-run houses.

The owned a substantial interest through a foreign subsidiary in, I believe, over 400 theaters in England, in Great Britain.

I told Mr. Lasky that it would be very important or it might be very important to him to make a close check and examination of the distribution of this picture in the Warner Brothers' houses themselves because there was a possibility that the terms on which the picture was booked in a Warner house were not as advantageous as they might have been.

At that time I didn't make any particular recommendations about foreign distribution because the first statement showed nothing whatever with respect to foreign distribution. That came later. [196]

Q. Did you have occasion to review any subsequent statements that Mr. Lasky received?

A. I reviewed all that he received.

Q. Were you familiar with the vouchers and checks that accompanied those statements?

A. Yes.

Q. Did you give any advice with regard to the checks that were received?

A. Yes, I did. I told Mr. Lasky that he should

(Testimony of James D. Miller.)

make certain and he should consult his attorney to see whether he would be foreclosing himself from making a claim against Warner Brothers by the acceptance of the checks because of the nature of the voucher. The voucher checks were accompanied by a letter and accounting statements.

Q. Did Mr. Lasky follow your advice as to whether to have an audit of the participation contract?

A. Mr. Lasky agreed or decided that there should be an audit. The time of the audit had not been determined. As a matter of fact, there never was an audit.

Q. Later in 1942 did you render any services to Mr. Lasky? A. Yes.

Q. Will you tell us what they were, please?

A. As I previously testified, I did review and examine all of the quarterly statements received by Mr. Lasky on this [197] picture. The next statement to follow was for the three-months period, ended with February, 1942. There was considerable delay in the receipt of that. That was not received until the end of May. So it was sometime in May, 1942, when I examined that statement and discussed it, not only with Mr. Lasky, but his attorney Loyd Wright.

In the meantime Warner Brothers had asked him to agree to sharing the cost of the advertising campaign. That was a new element that had been injected into it. This statement was the first one to show any foreign income, but it didn't show enough

(Testimony of James D. Miller.)

income to exceed the $150,000 beyond which Mr. Lasky began to share.

The statement showed the substantial restricted funds in England. It showed a deduction for quota losses in England. It showed other deductions. I questioned the propriety of Warner Brothers classifying these earnings in England as restricted funds because I pointed out to him that there was a distinct possibility that these funds to the credit of Warner Brothers in England were being used in England by Warner Brothers' own subsidiary over there, and if that were the case, then they should be treated as having been received by Warner Brothers and Mr. Lasky was entitled to his share.

The Court: Why would not they be reported as received?

The Witness: The contract that Mr. Lasky had with [198] Warner Brothers stated that as to foreign income it was not to be accounted for until it was received in this country.

The Court: Why?

The Witness: Because it might be blocked.

The Court: Was it at that time?

The Witness: There were restrictions but that money was available for expenditure in England.

The Court: What was the year, again?

The Witness: 1942.

The Court: At that time what was the world situation?

The Witness: We were at war.

(Testimony of James D. Miller.)

The Court: Had England blocked the taking out of funds? England has a rather complicated pound sterling mechanism whereby they put restrictions on the transfer of pound sterling within the dominion. So it is true there were restrictions at that time on the taking of funds out of England, is that right?

The Witness: Yes, your Honor.

The Court: Were they entirely blocked?

The Witness: No. There were quotas worked out. There were certain amounts that were permitted to go out. There were restrictions throughout the British empire.

The Court: What was the policy of Warner Brothers about their receipts in England from English distribution of the picture? Was it partly a matter of policy, partly a matter [199] of restriction as to whether any funds from the distribution of the picture abroad or in England would be received in New York?

The Witness: There were restrictions on transferring funds from England to the United States, but those funds were available in England for expenditure by Warner Brothers in England.

The Court: I understand that.

There was a provision in the contract, if I recall correctly, that the accounting to Mr. Lasky would be on the basis of receipts in New York or the conversion of the foreign fund into dollars as an alternative.

(Testimony of James D. Miller.)

The Witness: There was. But if the funds were spent in England by Warner Brothers——

The Court: Let us stick to one thing, Mr. Miller. I think you get away from the point a little bit. Before we get to the exceptions or the ifs, we have to be clear about what the positive features are. Let us just concentrate on that because we have that contract in evidence and your testimony may be helpful about it.

Suppose you tell the Court what could be done under the contract and then you can go over to the exceptions and what was being done or what you feared might be done. After all, we are trying to establish facts here and I don't want the record to get over into the area of speculation. You are talking [200] about what Warner Brothers might do. They might be using the funds for their expenditures.

Did you actually know whether Warner Brothers was using those funds for their expenditures or was that just a possibility you thought you ought to call to Mr. Lasky's attention?

The Witness: That was a possibility. That was one of the points——

The Court: It was just a possibility that you wanted to call to Mr. Lasky's attention?

The Witness: That is correct.

The Court: I guess that is all, then. I don't think we need to go into anything else.

Q. (By Mr. Bauersfeld): You examined the subsequent statements, then, Mr. Miller?

(Testimony of James D. Miller.)

The Court: Let me ask you another question, Mr. Miller.

In the record that we have in this case, there are one or two references to a Mr. Miller, and I presume you are the Mr. Miller. I want it to be clear now, however, were you retained by Mr. Lasky? From your testimony, I am not quite sure whether you were retained by him.

You say from time to time Mr. Lasky came and asked me this, Mr. Lasky came and asked me this and I gave him some [201] advice.

Did he just drop into your office or had he engaged you to be his accounting adviser just as he would have a legal adviser? Perhaps you had always been Mr. Lasky's accounting adviser, going back several years. Is that the situation?

The Witness: I had worked for Mr. Lasky as far back as twenty-five years ago, as far back, I think, as 1930.

The Court: You had?

The Witness: I had. At various times whenever he felt in need of any services——

The Court: That is all right.

That does not answer my question. At this particular time, about the time of the opening of Sergeant York in New York, what was your relationship with Mr. Lasky?

The Witness: I was not under any formal retainer.

The Court: After that did you make some ar-

(Testimony of James D. Miller.)

rangement with Mr. Lasky that you would be retained by him?

The Witness: I worked for Mr. Lasky anytime he asked me to, anytime he wanted me to or anytime his attorney asked me to.

The Court: Of course you billed him for your services?

The Witness: I did, yes.

The Court: You don't want to commit yourself to saying you were retained by Mr. Lasky but since you billed him [202] for your services you would have to say that you were employed by Mr. Lasky?

The Witness: That is correct.

The Court: This was not just friendly, gratuitous advice based on your long friendship with Mr. Lasky?

The Witness: No.

The Court: He just didn't drop in and say, "Joe, what do you think I ought to do?", and you said, "Well, Joe, you ought to do this." It was not that at all, was it?

The Witness: No, I was employed by Mr. Lasky.

The Court: It took us a long time to get to that. Why do you do that, Mr. Miller? The Court simply wanted to know whether you were employed by Mr. Lasky and you could have said, "Yes, I was," and then I would not have had to ask you those questions.

The Court wants to get a fact established. The Court will do that, even if it has to ask questions. You can always save yourself that difficulty by just

(Testimony of James D. Miller.)

giving the Court the fact that you know the Court wants to get and not beat about the bush so much.

Now, let us go on.

Q. (By Mr. Bauersfeld): Did you examine subsequent statements that were received by Mr. Lasky?

A. Yes. There were two later statements that I had [203] examined.

Q. Did you have any particular advice regarding those?

A. Yes. It was pretty much of the same tenor. There were perhaps a few additional features. There arose the question of exchange rates used and as of what time were these exchange rates established. The question arose as to why they had not distributed the picture in more foreign countries. I don't recall any other points that we raised subsequently.

Q. Did you have anything to do with the sale by Mr. Lasky of his rights in the Sergeant York picture to United Artists Corporation? A. Yes.

Q. Will you tell us what you had to do with that transaction?

A. It was in November, 1942. His attorney, Loyd Wright, came on to New York and said that he had received an offer from United Artists. They were willing and, as a matter of fact, eager to buy his interest in the picture. I don't recall that they made a definite offer as to amount, but certainly they had expressed their interest in it. Mr. Wright

(Testimony of James D. Miller.)

had communicated that to Mr. Lasky and Mr. Lasky was interested in selling it if he could get a fair price.

I suggested to Loyd Wright that inasmuch as he was connected with United Artists that he might feel better if there was some competition injected into this. I said that I [204] could go to Adolph Zukor, who was then chairman of the board of Paramount, and see whether Paramount would be interested in buying Mr. Lasky's interest or whether Mr. Zukor in the alternative would get together a syndicate that would buy it.

I told Mr. Wright that he had better first consult with Mr. Lasky to see whether he wanted me to do that, because I didn't know whether Mr. Lasky would be interested in selling it to Mr. Zukor. Mr. Lasky told me that he would be glad to sell it to Mr. Zukor, if he would offer a good enough price.

So I went to see Mr. Zukor. Mr. Zukor told me that Paramount itself would not be interested in buying it, but that he would get a syndicate together. He included in that syndicate Joseph Schenck, and I don't remember who were the other participants, and he made an offer of $800,000.

I communicated that offer back to Mr. Lasky and Mr. Wright and then United Artists came up with a bid of $805,000. The sale was then made to United Artists on December 4, 1942, for $805,000.

Q. Were you present at the time the sale was concluded? A. Yes, I was.

(Testimony of James D. Miller.)

Q. Who represented United Artists at the time of the closing of the transaction?

A. Mr. Raftery.

Q. Who represented Mr. Lasky?

A. Loyd Wright. [205]

Q. You were also present?

A. I was also present.

Q. Was Mr. Lasky present?

A. No, not as I recall.

Q. At the time the transaction was concluded on December 4, 1942, between United Artists Corporation, do you know if Warner Brothers knew the sale was going to take place?

A. They didn't know it, as far as I knew.

Q. Was there any understanding, as far as you knew, that United Artists would resell this contract to Warner Brothers?

A. No. It was contemplated at that time that they would hold it indefinitely.

Q. With whom were such conversations held?

A. With Mr. Raftery and Loyd Wright.

Q. As of December 1942, do you know what the status of the Sergeant York picture was with regard to distribution?

A. No. The last statement that had been received down to that date from Warner Brothers was for a period ending August 29, 1942.

That statement had been received about the middle of October of 1942. That showed that the amount due Mr. Lasky according to Warner Brothers' accounting was $570,000. It was known that

(Testimony of James D. Miller.)

there were subsequent earnings and how much they were we were speculating on. We didn't really know.

Q. Other than from a monetary standpoint, what was the [206] status of the picture with regard to distribution?

A. We thought that the picture had been pretty well exploited domestically. There would still be perhaps some foreign exploitation, and there would, in all probability, be a release of restricted funds abroad. Then, of course, there could be subsequent runs of the picture.

Mr. Lasky's participation interest, as I recall, was to continue for a period of five years, from its first release. At this point it had been released just about a year and a half. So in all probability, within the five-year period, there would be subsequent runs and there would be additional film rentals received.

Mr. Bauersfeld: You may inquire.

Cross Examination

Q. (By Mr. Transue): Going back to December, 1941, Mr. Miller, you state that Mr. Lasky had furnished you with an earnings statement in regard to this picture, Sergeant York, which indicated that there were earnings of $1,800,000, as I understand it.

A. That was the gross film rental, yes.

Q. What do you mean by "gross film rentals"?

A. That would be the amount that Warner Bro-

(Testimony of James D. Miller.)

thers had received from the exhibitors for the showing of the film.

Q. What period did that statement cover?

A. Under the contract, Warner Brothers was to furnish [207] statements quarterly. This statement covered a period of slightly more than a quarter, and I think that the reason an earlier statement had not been submitted was that it would have been too short a time to warrant a statement.

So Warner Brothers skipped the first period and then consolidated the first five months into the first statement.

Q. So the figure of $1,800,000, which you mentioned, covers from July through November, 1941?

A. Yes. I mentioned the figure $1,700,000.

Q. You have stated that you saw in some newspaper or some magazine the fact that the earnings of this picture aggregated $4 million?

A. Yes. That appeared in the New York Times at the close of the year 1941.

Q. What did that $4 million figure represent? Receipts by the exhibitors?

A. That was supposed to be what Warner Brothers had realized from the licensing of the film.

Q. So in your mind there was a discrepancy of about $2,300,000 between what Warner Brothers reported to Mr. Lasky and what the New York Times reported?

A. Not necessarily $2,300,000, because the figure of $1,700,000 went down to November 29, 1941, and the accompanying letter contained this statement

(Testimony of James D. Miller.)

"We have not as yet received [208] any reports covering rentals derived from distribution of the production within the Dominion of Canada and foreign countries. There probably had been some distribution of the picture in Canada and in foreign countries down to the end of November, but Warner Brothers in their attempt to get a statement out very promptly as of the end of November did not wait to receive those statements and include them in their accounting."

Q. Do you have any knowledge as to where the New York Times acquired information to the effect that $4 million was being grossed on this picture?

A. No. Sometimes statements like that must be taken with a grain of salt. It may be that for some reason someone wants to get some very favorable publicity for a picture. It might be propaganda to tout a picture to get the Academy Award. This picture was considered very seriously for the Academy Award. As a matter of fact, Gary Cooper did get an Academy Award for his work in this picture.

Q. Knowing that discrepancy, as agent for Mr. Lasky, did you make any inquiry of Warner Brothers in regard to it?

A. I made no inquiry of Warner Brothers at anytime. I confined myself to telling Mr. Lasky that there was a big gap between these two figures and certainly at the proper time there should be a very careful examination made.

Q. By whom? Mr. Lasky, or his agent?

A. By Mr. Lasky or his agent, yes. [209]

(Testimony of James D. Miller.)

Q. I understand that you have read the contracts which Mr. Lasky entered into with Warner Brothers? A. Yes.

Q. Is there any provision in those contracts for the audit of Warner Brothers' accounts?

A. Yes.

Q. Do you recall what provision is contained in the contracts with regard to periodical audits?

A. There is nothing in the contract that requires the audit to be made at any specified time. The contract states that Warner Brothers is obligated to maintain records at its New York office and have them available so that the accounting can be checked.

Q. Did the contracts provide that an audit would be made by any specific firm of accountants?

A. It does not.

Q. In glancing over the contracts, I notice that the name of Price, Waterhouse and Company was mentioned. A. It is, yes.

Q. What connection would they have?

A. They were the regular outside auditors employed by Warner Brothers. Their connection in that contract has to do with the employment by Warner Brothers of accounting methods and practices approved by Price, Waterhouse.

Q. They were not supposed to make an audit in regard to [210] the earnings of this picture?

A. Price, Waterhouse and Company, in the normal course of its audit, would not make a detailed

(Testimony of James D. Miller.)

examination such as would be required for this picture.

Q. Mr. Lasky never engaged you to make that investigation?

A. He engaged me in that he told me he wanted me to make the audit. But as I previously stated, no date was set as to when we were to start. As a matter of fact, it was decided that we should delay it for the time being.

Q. It appears, according to your statement, Mr. Miller, that there was always a backlog of earnings in addition to that realized and reported in the quarterly statements?

A. There is some backlog, yes.

Q. You examined all of the statements that had been received by Mr. Lasky? A. Yes.

Q. In November, 1942, you state that the last earnings statement covered the period, if you will again state what it was?

A. It covered the period ending August 29, 1942.

Q. What was his share of the earnings as indicated in that statement? A. About $370,000.

Q. Which had accumulated for what period?

A. For three quarters.

Q. That is nine months? A. Yes.

Q. The picture was then averaging about $63,000 a month for Mr. Lasky?

A. I don't know. Do you mean the last quarter?

Q. No, I mean for the nine months. If he earns $570,000, that would be an average of $63,000 a month.

(Testimony of James D. Miller.)

A. That could be a mathematical average, but the receipts from the distribution of a picture are on a declining scale from the first couple of months after release on down to a point when it dwindles into nothing.

Q. You assumed that there was a backlog that had not been covered in the original statement, perhaps upward of a couple of million dollars.

A. I didn't assume that. I knew that there was some backlog.

Q. You stated that you advised Mr. Lasky in regard to the sale of his interest to United Artists for $805,000?

A. May I have that question.

(Question read by the reporter.)

The Witness: Do you mean by that question that I recommend that he sell it for $805,000?

Q. (By Mr. Transue): We will make it that.

A. I made no such recommendation.

Q. Did anybody make such a recommendation to him that you know of?

A. That was Mr. Lasky's own decision. I believe Loyd Wright concurred in that decision, having in mind the reasons that impelled Mr. Lasky to arrive at that conclusion.

Q. In November of 1942, you, however, were aware of the fact that Mr. Lasky was entitled to more than $370,000 as his share in the earnings of this film? A. Yes, I thought he was.

Q. What did you think he was entitled to at that time? A. I hadn't the faintest idea.

(Testimony of James D. Miller.)

Q. Do you know of anybody who did have an idea as to what that interest was worth at that time?

A. I knew that Mr. Loyd Wright had been over to the Warner Brothers office and had talked to one of the Warners. I knew he had gotten some figures. As a matter of fact, I didn't understand the figures that he got.

Q. He communicated what he got by way of information from Warner Brothers to you?

A. Yes, he did. I didn't understand them.

Q. What was ambiguous about them?

A. It didn't add up. I couldn't make anything out of them.

Q. As Mr. Lasky's adviser, wouldn't you call that to his [213] attention and tell him that he was probably entitled to a considerable amount more than had been reported to him or was indicated by the offer?

A. That is not quite what it was. I believed that the picture, even under the Warner Brothers accounting, would show more than $805,000 due Mr. Lasky.

Q. At the time the negotiation was entered into with United Artists?

A. No, not at that time. What I am saying is this. I believe that if Mr. Lasky had sat tight he would have realized more than $805,000. How much more would be a guess.

The Court: This is all speculative, Mr. Miller, because no audit was ever made?

(Testimony of James D. Miller.)

The Witness: That is right.

Q. (By Mr. Transue): You stated it was the purpose of United Artists to hold this Lasky interest indefinitely? A. That is right.

Q. What do you mean "indefinitely," a week, two weeks?

A. No, perhaps for the full five years from the date of first release, which would have meant a period of another three and a half years.

Q. What is the basis for your assumption that they expected to hold it indefinitely?

The Court: Just a minute. I don't understand that. [214] Hold what indefinitely?

Mr. Transue: Hold this Lasky acquisition.

The Court: Read the question, please.

(Question read by the reporter.)

The Court: Who is "they"?

Mr. Transue: United Artists.

The Witness: It was not an assumption. There was talk about the plans that United Artists had to finish this acquisition. They had to negotiate a bank loan. There was some question as to what would be the term of the loan. It was contemplated by United Artists that they would negotiate with Warner Brothers at an early date after the acquisition and see how much money they could get out of Warner Brothers on account without tying their hands so that they could go in and make a larger claim if they saw fit than what Warner Brothers conceded was due under this contract.

That is what United Artists said was their inten-

(Testimony of James D. Miller.)

tion at the time. They hoped to get enough money on account from Warner Brothers to enable them to pay off the loan. Then when they had most of their money out of this, then they could sit tight and let the contract run on indefinitely.

The Court: How do you know all this?

The Witness: This is what was talked about at the time the sale was made.

The Court: Where was it talked about? [215]

The Witness: In United Artists' office.

The Court: Were you there?

The Witness: I was there.

The Court: Was some conference held prior to the conclusion of the transaction with Mr. Lasky?

The Witness: May I have the question?

The Court: There was a conference in the office of United Artists prior to the conclusion of the transaction with Mr. Lasky?

The Witness: Mr. Lasky was not present himself.

The Court: I didn't ask you that. I said you heard this at a conference, did you, prior to the conclusion of the transaction with Mr. Lasky?

The Witness: There were talks even before December 4.

The Court: I guess the answer to the question is yes. Is that right?

The Witness: I would like to make clear that there were talks both——

The Court: What is wrong with the question? Read the question.

(Testimony of James D. Miller.)

(Question read by the reporter.)

The Witness: Prior and subsequent.

The Court: Go ahead, Mr. Transue.

Q. (By Mr. Transue): Who was present at this conference representing [216] United Artists?

A. Mr. Raftery and there may have been a fourth present. I don't recall. I do recall Mr. Raftery and Loyd Wright and myself.

Q. You had worked for United Artists in accounting matters at various times?

A. Not for United Artists, no.

The Court: Or for anyone in United Artists?

The Witness: For some of their stockholders, yes.

The Court: Such as?

The Witness: Charles Chaplin and Mary Pickford. I think that is all.

Q. (By Mr. Transue): Do you know whether United Artists had in mind through its officers acquiring the Warner interest in this picture Sergeant York?

A. I never heard of such intention, no.

Mr. Transue: That is all.

Mr. Bauersfeld: No further questions.

The Court: Mr. Miller, you stated on direct examination that because of Mr. Wright's connection with United Artists you advised him to get a bid from some other concern, if possible, and then you consulted Adolph Zukor. What was Mr. Wright's connection with United Artists in 1942?

The Witness: It is my recollection he was secre-

(Testimony of James D. Miller.)

tary. [217] I believe he was a director. I am not sure about that.

The Court: You have had marked for identification two letters. What was the purpose of having them marked for identification?

Mr. Bauersfeld: I was going to have them introduced by Mr. Lasky when he took the stand. He has to explain that he no longer has the originals. These came from Mr. Miller's files.

The Court: All right.

You may step down.

Mr. Bauersfeld: May Mr. Miller be excused?

The Court: If he wishes to be, yes.

(Witness excused.)

Mr. Bauersfeld: Mr. Lasky.

Whereupon

JESSE L. LASKY

was called as a witness and after having been first duly sworn was examined and testified as follows:

The Clerk: Please be seated. State your name, Mr. Witness, and your address.

The Witness: Jesse L. Lasky, Los Angeles, California.

The Court: Mr. Lasky, you of course have given testimony in this case before and I suppose you don't need to be sworn again. We are just doing that for the record.

The Witness: I understand that. [218]

(Testimony of Jesse L. Lasky.)

Direct Examination

Q. (By Mr. Bauersfeld): Mr. Lasky, the record in this case shows that you entered into three contracts with Warner Brothers, which are exhibits D, dated May 8, 1940, and exhibits 2 and 3, dated May 15, 1940. Will you please take these exhibits and tell the Court the purpose behind them?

The Court: These exhibits have been received in evidence. I wonder if this is not a matter of repeating the testimony or going back into something that we already have in the record.

What is the number of those exhibits?

Mr. Bauersfeld: Exhibit D and exhibits 2 and 3.

The Court: Do you have a copy of the transcript before you?

Mr. Bauersfeld: Yes, ma'am.

The Court: Don't call the Court ma'am.

Mr. Bauersfeld: Yes, your Honor.

The Court: I think you better find out what you are getting into so you can find out if this will alter the testimony at all.

D was received at page 51. It was introduced by the respondent. That is indicated by the number.

What is Exhibit D entitled?

Mr. Bauersfeld: Exhibit D—— [219]

The Court: Step over and look at it, if you will, please.

These agreements have been covered in the findings of fact and one agreement that is referred to generally as an empoyment agreement, and then

(Testimony of Jesse L. Lasky.)

there are two agreements with Warner Brothers, one referred to as the supplemental agreement.

My recollection is that these agreements have been described in the record that we have made.

Are you going to repeat that? What are you getting into, Mr. Bauersfeld?

Mr. Bauersfeld: I am not going to repeat that, your Honor. I have no intention to repeat that. My purpose is this. I believe the Court in its opinion found that this was really one transaction. I wish to present evidence here to clear that point and show that the employment contract was separate and distinct from the contracts of May 15, 1940. The line of questioning will not be extensive.

The Court: The only way I can handle this, I believe, Mr. Bauersfeld, is for you to locate in the transcript the testimony of Mr. Lasky on this. We have plenty of time, and you may be seated and do that.

Mr. Bauersfeld: Thank you.

The Court: Presumably these questions were directed to Mr. Lasky in the first instance.

Mr. Transue: May we take a five-minute recess, your [220] Honor?

The Court: We can except for one thing. I am still looking over the table of contents of the transcript. It gives the pages in the transcript at which the respondent's exhibits were received in evidence.

The respondent offered a good many exhibits, beginning with C, going through X, going through Z, and going through double D.

(Testimony of Jesse L. Lasky.)

The minutes show that we have joint exhibits 1-A and 7-B, and then Petitioner's exhibits 2, 3, 4, 5, and 6.

Some of these exhibits must have been attached to a stipulation of facts. Either that or this table of contents of the transcript that has already been made is not a good table of contents.

If I were in your position, Mr. Bauersfeld, and had been asked by the Court to find something quickly under those circumstances, I might find some difficulty doing it. I am just trying to trace this down for you before we take the recess.

Let me see the exhibits you have, Mr. Lasky.

The Witness: Yes, your Honor (handing).

Mr. Bauersfeld: If the Court please, I believe exhibits 2 and 3 were a part of the stipulation of fact.

The Court: Mr. Lasky, is it colder in Los Angeles than it is in Washington? [221]

The Witness: No, it is not.

The Court: I hear California has been having some rainy weather.

The Witness: Yes.

The Court: It distresses me. I don't like California's reputation for a fine climate to deteriorate that way.

The Witness: I feel the same way. I am a native son.

The Court: So am I.

The Witness: I was born in San Francisco.

The Court: So was I. I was born in 1903.

(Testimony of Jesse L. Lasky.)

I have a copy of the stipulation of facts. The stipulation of facts covers five typed pages. Then attached to the stipulation of facts we have joint-exhibit 1-A, and that is the Lasky-York contract of March 23, 1940. Two is one of the contracts to which you are now referring, the contract of May 15, 1940, and 3, attached to the stipulation, is the contract of May 15, 1940, called the supplemental agreement.

I have satisfied myself about that. Two of these exhibits were attached to the stipulation of facts. During the recess, you have your copy of the transcript, Mr. Transue, you have a copy of the transcript, I presume, I have a copy of the transcript, I think it would be well for you to find Mr. Lasky's testimony because it may be hepful to you, Mr. Bauersfeld, to point out to Mr. Lasky what testimony he gave when he first appeared. It has been quite a long time since Mr. Lasky gave his testimony with respect to anything in these contracts.

Do you want the reporter to read the question again before we take a recess?

Mr. Bauersfeld: No, ma'am, I have the question written and I know what it is.

The Court: Suppose you give me the question again.

Mr. Bauersfeld: The record in this case shows that you entered into three contracts with Warner Brothers, Exhibit D, dated May 8, 1940, and Exhibits 2, and 3, dated May 15, 1940. Will you please

(Testimony of Jesse L. Lasky.)

take these exhibits and tell the Court the purpose behind them.

The Court: A contract speaks for itself. There has never been a question in this case about any ambiguity in any contract. According to my recollection, no one has felt it necessary to go outside the contracts.

You want Mr. Lasky to state the purpose behind the contracts. The Court wants you to state what the purpose behind your question is.

Mr. Bauersfeld: The purpose behind the question, your Honor, is to show that the contract of employment was separate and distinct from the contracts whereby Mr. Lasky sold his rights in Sergeant York's story or them to Warner Brothers and his participating rights in the gross receipts.

The Court: To whatever extent that question is important, and I think it is important, still it is a matter that the Court has to pass on and has already passed on, isn't that right?

Mr. Bauersfeld: Yes, your Honor. The Court concluded that it was really one transaction.

The Court: Your purpose then would be to ask the Court to modify its interpretation of these contracts?

Mr. Bauersfeld: Upon the receipt of this new evidence that the Court didn't apparently have before it before.

The Court: The question is, did the Court have it before it or didn't it have it before it. I guess what we are doing now is asking you to lay a foun-

(Testimony of Jesse L. Lasky.)

dation for your question. If we have this information before us, then this would be simply duplication, and we want to avoid duplication.

However, we will take a recess for a few minutes.

(Brief recess.)

The Court: Do you want to give Mr. Lasky the question, again, please?

Q. (By Mr. Bauersfeld): The record in this case shows that you entered into three contracts with Warner Brothers, Exhibit D, dated May 8, 1940, and exhibits 2 and 3, dated May 15, 1940. Will you please take these exhibits and tell the Court the purpose [224] behind them?

A. Exhibit 2, at least the exhibit for the sale of Sergeant York, states the amount I received for turning over my right, title and interest to the story of his life and his books. The supplemental contract recites the percentage I was to receive for the sale of the books. The other contract engaged me to produce the picture with one Hal Wallis as an associate producer.

Q. Was it necessary or required that you enter into the contract of May 8, 1940, which is Exhibit D, in order to receive the benefits set forth in the contract of May 15, 1940? A. No, not at all.

Q. If you had not entered into the contract of May 8, 1940, which is Exhibit D, would you have been able to sell the rights in the Sergeant York film to Warner Brothers?

A. The answer is that I sold the rights that I had before we entered into the contract.

(Testimony of Jesse L. Lasky.)

Q. Into which contract?

A. Into the employment contract. There was a question at one time. At one time I refused to go on as the producer. They had their own producer and we didn't see eye to eye. It is just a happenstance that I finally produced the picture at all.

The Court: The point always has been about this contract, that Exhibit D, which is called the employment contract, [225] is dated at a date prior to exhibits 1 and 2, dealing with the sale of your interest in the York story to Warner Brothers.

The question has been raised before as to those dates because Exhibit D, the employment contract, refers to a completed transaction with Warner Brothers about the York story.

So at the first hearing you were asked how it was that on May 8, 1940, when the so-called employment contract was entered into, that it could refer to the terms of the contract of a later date, May 15.

Perhaps you ought to try to clear up that problem about the dates.

The Witness: I would like to, your Honor.

After both these deals were made, the contracts were very slow in coming through. I believe I worked for several weeks without contracts. The employment contract is a very simple one. That is almost standard. The other contracts had percentages and qualifications. I imagine they were signed at a much later date.

The Court: But all the terms had been agreed to?

(Testimony of Jesse L. Lasky.)

The Witness: The terms had been agreed to. This was the order. I went to Warner Brothers to sell Sergeant York very much concerned because I paid $25,000, and I would owe $25,000 more, if I could not pay it in 18 months. I would lose my first $25,000. [226]

I had been to several of the other companies, particularly the company I once headed, Paramount, and they had turned it down, and one or two others had.

It looked like I had made a bad deal with Sergeant York. So I went to Warner Brothers with only one object in the world, to get out from under, and sell it. The Warner Brothers did not think too much of the deal either. That is why when I said I was willing to gamble they gave me the extraordinary percentage of 25 percent.

The Court: Had you worked for Warner Brothers before you entered into the contract of May 8, 1940, the so-called employment contract?

The Witness: No, your Honor.

Q. (By Mr. Bauersfeld): Would you have entered into the contracts of May 15, 1940, which are exhibits 2 and 3, if you were not employed to produce the picture? A. Yes, indeed.

Q. Will you explain?

A. As I have just explained, I had paid $25,000 for the rights and the only possible way I could recover my $25,000 or make a profit would be to sell my rights to Warner Brothers.

The Court: To any producer, isn't that right?

(Testimony of Jesse L. Lasky.)

The Witness: Any producer, that is right.

The Court: When you entered into the contract with [227] Sergeant York, you expected, didn't you, that you would try to have a picture produced on the life of Sergeant York?

The Witness: Oh, yes.

The Court: But at that time you didn't have your own producing company?

The Witness: No. I was an individual, simply an employee. I would like to explain that.

The Court: The York picture had no value to you in itself, did it, unless you sold it to a producer?

The Witness: No, unless I sold it, that is right.

The Court: Had you prior to this time gotten any stories that had been produced by Warner Brothers?

The Witness: No, your Honor.

The Court: Had you gotten any stories that were produced by any other producers?

The Witness: I had been employed by other producers, but the other producers would purchase the stories and give them to me to produce or I would recommend a story and the other producer would purchase it.

The Court: This York matter came up in 1940. Before 1940 what picture had been produced where you had gotten ahold of the story? Any picture?

The Witness: We had a corporation, Pickford-Lasky, and we produced a picture called One Rainy Afternoon and Gay Desperado. [228]

(Testimony of Jesse L. Lasky.)

The Court: Were those just regular scenarios or were they based on any particular story?

The Witness: It happens in both cases they were original stories.

The Court: Regular scenario stories?

The Witness: Yes, and the company purchased them, and I was assigned to produce them.

The Court: Was the York story the first biographical story that you got ahold of for production?

The Witness: Yes.

Q. (By Mr. Bauersfeld): Did you as an individual ever purchase any stories for resale before this? A. No, I never did.

Q. In your previous testimony in this case, Mr. Lasky, you testified you consulted James D. Miller and Mr. Loyd Wright. What did you consult them about?

A. Immediately after the picture was released, I was informed that the Warners, in their own circuit of theaters, would not pay the proper amount for the picture. The reason was because they would have to share the subsequent income with me. I was going to give the name. So I sent my contract to James Miller and consulted Loyd Wright.

Whenever I had a contract I always sent it to Mr. Miller. This was a matter of custom. Then when the first [229] statement came in, I did the same thing. I sent that to him. From the very beginning, I was disturbed because, while Mr. Miller testified that the Times quoted $4 million. the Va-

(Testimony of Jesse L. Lasky.)

riety and Reporter were quoting figures which looked wonderful for me, but the statements didn't bear them out. So I complained to Mr. Loyd Wright, and he would say, "You better turn that over to Jim Miller."

Q. Did you consult Mr. Wright or Mr. Miller about any particular action of Warner Brothers relating to the picture Sergeant York?

A. Yes. I received a letter from Albert Warner in which he said that "You will be with us for life." It was a very flattering letter. But he asked me to change the terms of the contract. That disturbed me very much.

I took a week to study the situation. I consulted Loyd Wright. He said: "There is nothing in the contract. You would be crazy if you change the terms." As a matter of fact, it annoyed me, and I wrote a letter refusing his request.

If I may continue, up to this time the atmosphere in the studio was very pleasant. Your Honor, Jack Warner, who was in charge of the studio and was the chief producer, we had an executive lunch every day; I would go to the lunches and we congratulated each other on the success of the picture.

After I refused to concede to the first request of changing the terms, the atmosphere changed. To say the least, [230] it was not a very friendly atmosphere. While I was very proud of the accomplishment, nobody congratulated me after that.

Q. I hand you Petitioner's Exhibit 8, for identi-

(Testimony of Jesse L. Lasky.)

fication, and Petitioner's Exhibit 9, and ask you if you can identify those. A. Yes, I can.

Q. Do you have the original of these letters?

A. After copies were made and sent—a few years after these copies were made, I moved my offices from one studio to the other, and finally we had a lot of files, and they were sent to my home. They were safe there until we moved to another home and Mrs. Lasky burned them with a lot of other papers.

Q. Are these correct copies of the letters that you did receive?

A. These are correct copies.

Mr. Bauersfeld: I offer the documents in evidence as Petitioner's exhibits—I believe this shows Exhibit 8 and 9—but the record I believe shows the last one as Petitioner's Exhibit 8.

Could we check that one more time, Mr. Clerk?

The Court: Would you see what the numbers on the exhibits are? We are supposed to have all the exhibits here. What page of the transcript?

Mr. Bauersfeld: Ten and 11, your Honor.

The Clerk: Your Honor, eight does seem to be the [231] last exhibit number that was offered at the hearing.

The Court: Then the index to the transcript shows an Exhibit 8, but the minute sheet does not show an Exhibit 8. That is what our difficulty is.

Mr. Baird, will you re-mark these exhibits for identification as 9 and 10?

(Testimony of Jesse L. Lasky.)

(Petitioner's Exhibits No. 8 and No. 9 were re-marked for identification as Petitioner's Exhibits No. 9 and No. 10.)

The Court: You are now offering both of them?

Mr. Bauersfeld: Yes.

The Court: Any objection?

Mr. Transue: You have scrutinized these copies recently, Mr. Lasky, I take it?

The Witness: Yes.

Mr. Transue: And you are absolutely certain in all particular they are accurate?

The Witness: Yes.

Mr. Transue: No objection.

The Court: Exhibits 9 and 10 are received in evidence.

(Petitioner's Exhibits No. 9 and No. 10 were received in evidence.)

[See pages 444-454.]

Q. (By Mr. Bauersfeld): Did you discuss or consult Mr. Wright or Mr. Miller [232] about any other action of Warner Brothers other than the receipt of this letter?

A. Yes, I did. They asked me to participate in advertising. There was nothing in my contract that provided that I should share in the advertising. So I asked them their opinion and they said, "You are right. You should not share. The contract does not provide that." In spite of their advice, hoping to get a little friendlier atmosphere, I believe I agreed and did share in the advertising.

(Testimony of Jesse L. Lasky.)

Q. Was there any other matter that you discussed with them in particular?

A. Yes. There was a third matter. One of the books on Sergeant York's life is one written by Skeyhill. Skeyhill accused Warner Brothers of plagiarism when they produced the picture. They withheld $10,000 of my funds to defend the suit when it should come up. Again the contract did not provide for that. I had nothing to do with that. I consulted Loyd Wright and Jim Miller. But they had already taken the $10,000.

Q. What did Mr. Wright and Mr. Miller advise you to do?

A. All this time they were advising me to have an audit. I felt that the audit would show discrepancies. If they did, my position would be untenable. I wanted to continue at Warner Brothers. I had been going from one studio to the other and here was a chance to remain for the rest of my life, I felt. For that reason I acquiesced. [233]

Q. Did you acquiesce in having the audit?

A. No.

The Court: You mean you acquiesced in their retention of $10,000, or so, to pay the costs of a possible plagiarism suit?

The Witness: That is right.

The Court: That is my understanding.

The Witness: May I say, as to the audit, I would not let them make the audit.

Q. (By Mr. Bauersfeld): The record shows that you sold your rights in the picture Sergeant

(Testimony of Jesse L. Lasky.)

York to United Artists on December 4, 1942. Why did you sell these rights to United Artists Corporation?

A. I felt that in view of the several unpleasantnesses and things that I foresaw, if I could transfer my rights entirely, I would go ahead without any more trouble or disputes. I just can't thrive in an atmosphere of that kind.

Q. Why were you interested in not having any more troubles or disputes?

A. Because I had started a new contract. I was anxious to produce the Adventures of Mark Twain, which had been an ambition of mine for many years. I could have been discharged or not permitted to produce that and other pictures that I wanted to produce.

Q. Did you personally handle any of the negotiations [234] regarding the sale of your rights to United Artists on December 4, 1942?

A. No. I was in Los Angeles. Loyd Wright was in New York and so was Jim Miller.

Q. Who handled those negotiations for you?

A. Loyd Wright.

Q. What did Mr. Wright advise you about the negotiations?

A. In the first telephone conversation, he said that we have an offer of $800,000 from your old friend, if he is still your friend, Adolph Zukor. They seemed to question our relationship, but it was very friendly.

(Testimony of Jesse L. Lasky.)

Q. When you say "our relationship" you mean whose?

A. Mr. Zukor had been the president of the company, and I had been the vice president, and I had resigned during the depression. Nevertheless, I said I would be glad and there is no reason why I should not sell to Adolph Zukor. Then he called me very shortly after that, and he said "I have been shopping around, and I have an offer from United Artists for $805,000." I asked him what he thought. I asked him what Jim Miller thought. They said if you want to sell, this is the time to do it, and it is a fair offer. I was very happy to sell.

Q. Did you know that United Artists was going to resell the contracts to Warner Brothers?

A. No, I couldn't possibly know it.

Q. Prior to selling the contract to United Artists, did [235] you advise Warner Brothers that you were going to sell your rights to United Artists?

A. No, I did not.

Q. Was there any understanding between you, United Artists, or Warner Brothers, that your rights would be ultimately transferred to Warner Brothers? A. No, none whatever.

Q. Have you ever had any business connections with United Artists Corporation?

A. No, never.

Q. Mr. Lasky, why didn't you accept the checks which are exhibits R, X, and Y, from Warner

(Testimony of Jesse L. Lasky.)

Brothers, together with the statements they sent you during 1942?

A. Because at that time we were going to have an audit. It seemed very necessary and I was at that time willing to acquiesce. They told me if we have an audit and find any excess profits, if I accepted the checks we could not get the excess money.

Q. When you say they told you, who are you referring to?

A. Loyd Wright and, for that matter, Jim Miller, too.

Mr. Bauersfeld: No further questions.

You may inquire.

Cross Examination

Q. (By Mr. Transue): Are you still employed by Warner Brothers, Mr. Lasky? [236]

A. No, I am not.

Q. For how long a period did your employment with them last?

A. I think three years. It could have been four. I am not sure.

Q. Beginning in 1940?

A. Yes. I had a three-year contract during which time I produced Mark Twain and the Rhapsody in Blue.

Q. You were contemplating an audit of your account with Warner Brothers but never had it made, as you have indicated. In the absence of such an accounting, how would you know the approximate value of your interest in that picture?

A. I didn't actually know. I will say this,

(Testimony of Jesse L. Lasky.)

frankly, if they had said $750,000, I would probably have accepted, or if they said $850,000. From the gross figures and the receipts we had received at that date, as the picture was released, the receipts were less each week; it seemed that that would be a fair figure.

Q. You still, however, wanted to get all you could for your interest? A. Oh, yes.

Q. Did you ever offer to sell your interest to Warner Brothers? A. No.

Q. Why didn't you inquire if they would purchase it? [237]

A. I asked Loyd Wright to go to New York and try to sell our rights, and I had an idea that another company would purchase to the best interests. If he had gone to Warner Brothers and they had offered to buy it, I would have sold to Warner Brothers.

Q. You were shopping around or Mr. Wright was shopping around to get the greatest amount he could for this interest?

A. I did not do any shopping. I was in Hollywood attending to production. Loyd Wright went to New York to sell the rights. As I testified, he first told me he had an offer from Adolph Zukor, and a few days later he said he had a better offer from United Artists.

Q. You never approached Warner Brothers in acquiring it. Do you know whether Mr. Wright did? A. I do not know.

Q. He may have done so?

(Testimony of Jesse L. Lasky.)

A. I have no way of knowing.

Q. He never told you that he had?

A. I trusted him as a fine salesman, and I felt he would go wherever he could get the largest returns.

Q. After he told you he got $805,000 and had done some shopping, did you inquire of him as to whether he tried to sell it to Warner Brothers?

A. No, I did not.

Q. Did you inquire whether he attempted to sell it to [238] anybody other than Zukor or United Artists?

A. No. I left it to him. He was my agent to sell it. He apparently shopped around. He might have gone to other companies. But the only two he reported was Adolph Zukor first and then United Artists.

Q. Whatever Mr. Wright did was agreeable to you? A. Yes.

Mr. Transue: That is all, your Honor.

Mr. Bauersfeld: That is all, your Honor.

The Court: All right, Mr. Lasky.

(Witness excused.)

Mr. Ash: If your Honor please, we have one other witness.

The Court: That is Mr. Raftery?

Mr. Ash: Yes. He is a lawyer engaged in active practice.

The Court: The Clerk of the Court received a telegram from him. Will it be suitable to you and to Mr. Raftery if we hear him at 2 o'clock next

(Testimony of Edward C. Raftery.)

Wednesday afternoon? We have a motion calendar here on Wednesday, and I am in Court Monday and Tuesday. So I am not available, and I don't think a courtroom would be available until Wednesday afternoon. If that is not satisfactory, we could make it Thursday morning.

Mr. Ash: We have a letter this morning from Mr. Raftery, signed in his behalf, from his office we have a letter, [239] saying that he will arrange to be here on Wednesday, January 26, 1955, at 12:30 noon. He told us in New York this week that he was before the United States District Court in Utica or Syracuse, one of those towns, and he was confident that he would complete his case there by the evening of Tuesday.

The Court: Mr. Transue, did you have anything you wanted to say?

Mr. Transue: Whatever your Honor decides to do is satisfactory to me. I will be free all next week.

The Court: It seems that the best thing we can do is to recess until Wednesday at 2 o'clock. Mr. Raftery expects to be here at noon, and he will be available at 2.

Mr. Ash: That is right.

The Court: All right, we will recess until next Wednesday, at 2 o'clock.

(Thereupon, at 12:30 p.m., a recess was taken until 2:00 p.m., Wednesday, January 26, 1955.)

The Court: Good afternoon.

The Clerk: I will call now dockets 26396 and

26397, Bessie Lasky and Jesse L. Lasky, which cases were recessed on last Friday and continued to this day.

The Court: You may proceed.

The Clerk: Will you take the stand, please, Mr. Raftery?

Whereupon,

EDWARD C. RAFTERY

was called as a witness, and having been duly sworn, was examined and testified as follows:

The Clerk: Please be seated.

Will you please state your name and address, Mr. Witness?

The Witness: Edward C. Raftery, R-a-f-t-e-r-y, 67 Continental Avenue, Forest Hills, Long Island.

Direct Examination

Q. (By Mr. Bauersfeld): Mr. Raftery, what is your profession? A. Lawyer.

Q. And where is your office located?

A. 152 West 42nd Street, New York City.

Q. Do you specialize in any particular field of the law? [242]

A. Well, in the motion picture business, the last several years primarily in developing anti-trust cases, but generally in the motion picture and theatre business.

Q. And how long have you been doing that work? A. Well, about 35 years.

Q. Now, directing your attention to the year

(Testimony of Edward C. Raftery.)

1942, were you at that time connected with the motion picture industry in any way?

A. Well, I was president of the United Artists Corporation from November '41 until August '47, so in '42 I was president of United Artists.

Q. Do you know Mr. Jesse L. Lasky?

A. Yes.

Q. And how long have you known Mr. Lasky?

A. Well, I first met him about 1919, 1920, when he was over at Famous Players-Lasky on Fifth Avenue. I didn't see much of him until 1936 when he formed a partnership or producing company with Mary Pickford; the Pickford-Lasky Company, and then I didn't see him from '36 until last week.

Q. Are you familiar with the fact that the United Artists Corporation purchased Jesse L. Lasky's rights in the picture "Sergeant York"?

A. I negotiated the deal.

Q. And as president of United Artists Corporation at that time will you tell us what you did with respect to the [243] purchase of the rights of Mr. Lasky in the picture "Sergeant York"?

A. Well, Loyd Wright, who is now the American Bar president, came to me in California and wanted to know if United Artists would be interested in buying Lasky's interest in a picture called "Sergeant York." Well, I said "We've just purchased all these Paramount pictures, including all of the Hopalong Cassidy's, and the others, and of course we would be interested in purchasing anything else, because our producers aren't producing

(Testimony of Edward C. Raftery.)

and we got to make money some how, so if the price is right and we can make a deal I would be glad to sit down and negotiate with you." And I did negotiate with him.

I also told him that before we'd reach any conclusion there were one or two things I would like to clean up, one of which was that I wanted to confer with Gradwell Sears, who we had hired as general sales manager the same time I became president, and Sears had previously been with Warner Brothers and had resigned; but, as I explained to Wright, Sears was the man who had first put "Sergeant York" into distribution, and I'd want to know from Sears whether we should go ahead with the property or not.

I also told him another thing I'd want to consider with Sears was whether we should keep the property and let it work itself out, or if we could find a purchaser for resale at a profit, as I was anxious to make a little money during [244] the '42 year, distinguished from the future, because of the fact we had had a bad year.

The Court: Who is Sears? By whom was Sears employed at that time?

The Witness: He was vice president, United Artists Corporation, in charge of domestic sales.

The Court: How could Sears, employed by United Artists, have had anything to do with the original distribution of the picture "Sergeant York" that was produced by Warner Brothers?

The Witness: He was general sales manager of

(Testimony of Edward C. Raftery.)

Warner Brothers going back to about 1932 down until he resigned in October of 1940, just before we hired him at United Artists, and he was the man who originally put "Sergeant York" into distribution.

The Court: For Warner Brothers?

The Witness: For Warner Brothers, and naturally he knew all the details of its grosses and what not, and its potential.

Q. (By Mr. Bauersfeld): Did you talk to Mr. Sears about it?

A. Oh, yes. Sears and I had several conferences on it right in California, and Sears told me that in his opinion the picture had a great potential, that in addition to having only had its pre-release engagements at advanced admissions, [245] it still had once around again at regular admissions, and you had all the foreign. And he said "What price? What is Wright asking for it?"

I told him he wanted $850,000. Sears said "I think it would be a bargain if you can get it at that price."

Sears also said "And let's hang onto it and keep it and let it work itself out, and I think we'll end up with a very substantial profit on the deal."

Q. Did you close the deal then with Mr. Wright?

A. I didn't close the deal then. I called Warners in New York and I talked to, I think it was Schneider. It was either Schneider or Bob Perkins. I can't remember at this late date. And I told him that I had an opportunity to buy this

(Testimony of Edward C. Raftery.)

property, or the 25 per cent interest in the property, from Lasky, and I said "If I do buy it we're going to have to make up our minds whether we want to keep it and be in association with you, or would you be interested in a repurchase if we decided not to keep it?"

Well, they told me that Lasky had squawked or complained to them that he didn't think the picture was getting the fullest distribution that it should get and if we bought it out they'd like to negotiate to see if they could rebuy it from us.

I said "It's a question if we can make a profit. I might make a deal with you." Then I went back to Wright and told Wright I'd like to have my office in New York, my law office, [246] prepare the instruments of transfer and that we'd make the deal at 805. And the deal was closed.

If I remember correctly Paul O'Brien, who is still my partner, drew the contract, sent it to me in California, and I went over it and sent it back to New York for execution in New York, but I don't know where Lasky signed it, because I didn't see him at all during any part of this transaction.

Q. I know that Mr. Arthur Kelly signed the contract on December 4, 1942, on behalf of United Artists. Do you know where Mr. Kelly is now?

A. He died two weeks ago in Nice, Italy, or Nice, France, I should say.

Q. Did you have any understanding with Mr. Lasky or his representatives that United Artists

(Testimony of Edward C. Raftery.)

would transfer the rights it acquired from Mr. Lasky to Warner Brothers?

A. I never saw Mr. Lasky during it and I had no understanding of any kind with Mr. Wright except I was making a deal to buy a specific piece of property.

Q. Are you familiar with the contract between United Artists Corporation and Warner Brothers dated December 22, 1942, which is exhibit AA?

A. I believe I am. I haven't seen it in some time.

(Document handed to Witness.)

The Witness: Yes, I signed that contract. [247]

Q. (By Mr. Bauersfeld): Do you know why paragraph 4 was inserted into the contract?

A. Let me see paragraph 4. Yes.

Q. Will you tell the court what you know about that?

A. Warner Brothers insisted at first in getting a release from Lasky and they wouldn't go through with the deal unless we gave them the release, and I told Paul O'Brien that if our grant that we got from Lasky was broadened sufficient enough to warrant our execution of this release to go ahead and sign it up because I was anxious to see the deal closed.

Q. What particular thing did Warner Brothers want released?

A. Well, they said that Lasky had complained about the manner in which they had distributed the picture and was not satisfied with some of the re-

(Testimony of Edward C. Raftery.)

turns, and they didn't want any—I can't remember the phrase that he used. He said "We don't want any more of those William S. Hart lawsuits."

Mr. Bauersfeld: You may inquire.

Cross Examination

Q. (By Mr. Transue): Mr. Raftery, in what activities were United Artists engaged? Did they produce pictures? A. No, sir.

Q. What——

A. United Artists from the time it was formed in March [248] of 1919 has never produced a picture. It was purely a distributor of pictures that it would acquire from other sources, independent producers. Originally it was Mary Pickford, Charles Chaplin, W. D. Griffith, and Douglas Fairbanks, and as years wore on others came in. By 1941 we were down to a point where we had practically no producers and at that time in '42 was when we went out and tried to acquire pictures produced by other companies for distribution, or for resale, or for any purpose we could get them. That was our sole business.

Q. Is United Artists a closely held corporation?

A. At that time it had four stockholders and finally it got down to three stockholders. It's never been on the board, never has sold any stock or anything of that kind. It's always been a small, closely confined corporation.

Q. How long were you associated with United Artists?

(Testimony of Edward C. Raftery.)

A. Well, I helped draw the charter in 1919, and we were with them up until, in 1952 I think it was. No, '51. Miss Pickford and Mr. Chaplin sold half their stock to Messrs. Krim and Benjamin, who happened to be members of a law firm, and that ended our connection as counsel, except we do special work as trial counsel for them occasionally.

Q. By "we" and "our" you mean your law firm?

A. That's right.

Q. How long have yon known Loyd Wright?

A. 1927 I think it was I first met him. I knew his [249] brother before him, who was the first member of that firm.

Q. How long was Wright associated with United Artists?

A. Wright was West Coast counsel, as they called him from I think 1936 on, and I don't know whether he is still in the position or not.

Q. Did he have a financial interest in United Artists? A. Oh, no. None.

Q. Did you have a financial interest in it?

A. No, sir.

Q. When did Mr. Wright first approach you in regard to acquiring the Lasky interest in "Sergeant York"?

A. I'll try to remember it and I remember it by association with a football game. It was at a football game in the Los Angeles Stadium on the Saturday after Thanksgiving in 1942.

Q. That was the first contact that you had had?

A. In connection with "Sergeant York," yes.

(Testimony of Edward C. Raftery.)

Q. With this contract? A. Yes.

Q. What did Mr. Wright start discussing when he first mentioned it to you?

A. Well, he started off by saying "Now that United Artists is buying pictures from others and with no backlog of their own and nothing in reasonable contemplation," he says, "I think I can make a deal or get you a deal for 25 per cent [250] of "Sergeant York" in which you can make some money." That started the ball. I can't remember the exact conversation.

Q. Prior to that occasion United Artists had only bought the film itself? A. No.

Q. What did they buy?

A. They bought the copyrights, the negatives, the right to distribute, and—to answer you, if I think what you are after, this was the first time that we acquired an interest in a picture that we did not have the right to distribute, and it was for that reason that I was anxious to resell it, not having the right to distribute it, if that's what you are after.

Q. I just want to inquire, this is the first one in which you acquired a partial interest?

A. That's right. No, we had partial interest in pictures before that, but we had the right to distribute them, which was very important to us. The right to distribute means the right to license exhibitors to show them in their theatres. That right we did not get on "York" and that was why I was

(Testimony of Edward C. Raftery.)

anxious to make a deal to re-sell it and get our profit quick.

Q. How many conferences did you have with Mr. Wright after this football game?

A. Well, I'll wager 6, 7 maybe ten, before we finally made a deal.

Q. Where were those conferences held? [251]

A. Generally at his office on Seventh Street in Los Angeles in the Board of Trade Building.

Q. They were all held in California?

A. Yes. I didn't do a thing in New York until I did sign the deal with Warners in New York City, and that was when I came home for Christmas from Los Angeles, December 22.

Q. At none of those conferences, however, was Mr. Lasky present?

A. Never. As I told you in the beginning, I haven't seen him from 1936 when he was in association with Miss Pickford until he walked in my office last week with Mr. Bauersfeld.

Q. Who represented Mr. Lasky in those negotiations? A. Right.

Q. Anybody else?

A. No. Never saw anyone else but Loyd Wright.

Q. Did you ever hear of a James D. Miller?

A. Can't recall him. In fact I don't ever remember meeting a Mr. Miller. I may have, but I have no memory of it.

Q. How many people were present at these conferences?

(Testimony of Edward C. Raftery.)

A. Well, generally at practically all of them, just Wright and myself. I do remember Gradwell Sears was present in addition, with Mr. Wright, and that one conference was in my room in the Ambassador Hotel in Los Angeles.

Q. So at no time were anybody other than you, Mr. Sears, or Mr. Wright, present in regard to negotiating the [252] sale of the Lasky interests?

A. That's right. I never remember meeting anyone else in connection with it.

Q. And you never heard of a James D. Miller, a certified public accountant of New York?

A. No.

Q. In discussing the price to be paid by Mr. Lasky for his interest in the picture, did you have any financial statements, contracts, agreements, or anything before you?

A. Well, I had Sears, which was better than statements. Sears estimated—there's a thing in the business which is generally recognized, known, as estimating residual value. I consider Sears the top man. At least he was then. He isn't now. He's an invalid now, but in those days I don't know anyone could estimate a residual with more accuracy than Sears, and Sears' estimated that we would come out of it with better than a million dollars if we hung on to it, and that was the reason he was anxious to have us hang onto it and it was my view, contrary to his, that not having the distribution rights ourselves, I'd rather get a short profit

(Testimony of Edward C. Raftery.)

before the end of the year and that was the reason we sold.

Q. Did I understand you to say, Mr. Raftery, that you entered into these negotiations in November of 1942 and you thereafter expected to realize a million dollars? A. No. That year? [253]

Q. Or thereafter?

A. We expected not to make a profit of a million. We expected the gross return would be at least a million, so we would make the difference between eight hundred five and a million, but it might take three to four years to do it. That's the way you do with residuals. You break them down over the period of the life of distribution, which is generally five years domestic and seven years in the foreign.

Now, a picture like "Sergeant York," it would be longer because it had a pre-release at advanced admission prices, and then you have a general release and you go all over the thing again. And I don't know what the final ultimate gross was, but the last time I saw Sears he says "You still made a mistake. You would have gotten better than a million dollars back instead of the eight hundred twenty that you got on your short deal.

Q. The contract which Mr. Lasky had with Warners had been exhibited to you? A. Oh, yes.

Q. Had you made any inquiry as to the financial returns in regard to this picture?

A. Oh, surely.

(Testimony of Edward C. Raftery.)

Q. What did you discover in regard to the returns?

A. I have no memory of it now, none, and I sent up to the United Artists warehouse to try to find that old closed [254] file to see if there were any old work papers on it and I got word back yesterday that the only thing they found were the copies of the contracts in the old closed file. I have no memory of what the figures were then. All I know was that the picture had——

Q. Been entirely successful?

A. Successful.

Q. Had you seen financial statements in regard to the earnings of this picture which may have been submitted by Warner Brothers to Mr. Lasky throughout this period?

A. It is my recollection that there were exhibited to me the gross returns as reported by Warners on the distribution of the picture. In fact I know they were. I wouldn't have made a deal unless I knew those facts, but I have no memory of them.

Q. Do you have any memory as to when the distribution of "Sergeant York" started?

A. No. It started before Sears came to us. I saw the picture in Nashville, Tennessee, in the summer of '41, so it must have started before that, that is, in the pre-release.

Q. And you have no recollection whatever as to any amounts which may have been shown in any of these financial statements?

(Testimony of Edward C. Raftery.)

A. No. Those were settlement statements sent each week and that's what was exhibited to me, the Warner settlement [255] statements.

Q. Sent each week?

A. Each week or month. I don't know now, but generally every week they send a settlement statement out, on the domestic, not on the foreign.

Q. At the time you entered into these negotiations to acquire Mr. Lasky's interest in the latter part of November of 1942 did you have before you a statement showing the earnings attributable to his interest as of the end of July 1942?

A. Oh, I must have. I must have.

Q. Would it refresh your recollection any if I called your attention to the fact that that statement disclosed earnings for a nine-month period of approximately $570,000?

A. No. It doesn't refresh it a bit. I have no memory on the thing really. I wish I had, but I haven't. I just remember the deal and I know we got our profit and that was it.

Q. At the time you entered into the deal did you realize that Mr. Lasky was entitled to some distribution of earnings in regard to that picture?

A. Well, it is my recollection he was. I can't tell you how much, but I thought the production costs had all been recooped and they were——

Q. Distributing profits?

A. Sure. I don't know whether you call it profits. [256] They were distributing the excess over the production cost.

(Testimony of Edward C. Raftery.)

Q. And you had no idea?

A. I had no idea then? Of course I did. Of course I did. I not only had an idea, but I had my idea investigated to make sure I was right.

Q. The record heretofore made in this case, Mr. Raftery, indicates that at the time you entered in these negotiations with Mr. Wright on behalf of Mr. Lasky there were approximately $822,000, to be exact, $822,857.56 accrued earnings to which Mr. Lasky was entitled as of November 28, 1942.

A. I have no memory of that. I have no memory of the amounts at all. All I knew was that I reached a judgment it was a good buy, made it——

Q. What made you determine that it was a good buy at $850,000?

A. Because of what the receipts in the picture were to date, and what Sears estimate was of the future, and we also had to take in consideration the terrific foreign market that picture would have.

Q. Why did you make your offer $850,000 instead of $1 million?

A. I didn't make the offer. Wright placed the price on it and I agreed to it. I didn't make an offer. I didn't offer a nickel, and I wouldn't.

Q. Did you make a counter offer? [257]

A. No. After we had been assured, after I had been assured by Sears that $850,000 could work itself out with ease I went ahead with the deal.

Q. $850,000 could work itself out in ease?

A. With ease.

(Testimony of Edward C. Raftery.)

Q. When you were entitled to the immediate return of $822,000 in cash?

A. I don't remember being entitled as of right to $822,000 at all. I have no memory on that.

Q. Your objective was to hold this interest that you acquired from Mr. Lasky until you made a million dollars? A. No. No. I said Sears.

Q. That was Sears?

A. Sears felt that if we held onto it for any period of time we would have gotten back a million dollars.

Q. What do you mean by any period of time?

A. A year, two years.

Q. At the time you acquired the interest in "Sergeant York" it was still in full distribution?

A. Not in full. You had taken off the big cream with the pre-release. It was in short distribution, as we call it, after it had played all the key cities and all the important runs. Then you started all over again at regular admission prices.

Q. The statement produced by Mr. Miller last Friday [258] indicated that the distributions which Mr. Lasky was entitled over a nine-month period aggregated approximately $570,000.

A. Could be so. I don't recall it.

Q. That was an average for the nine-month period of $63,000?

A. Well, you can't strike averages in this business. As the picture goes along the line it goes down, down, down, and gets less each month. You start your first month of distribution and you play

(Testimony of Edward C. Raftery.)

your big key cities, cities you get your big money in. It is the old formula, 72 per cent of your revenue comes from 28 per cent of your accounts, and the 28 per cent of your accounts are the key runs in the big cities like Washington, and Baltimore, and Boston. Then as you go down the line you begin servicing accounts that will pay as low as $25 or even $15, and as the picture progresses from month to month the returns get lower, lower, lower, so you can't use averages in the picture business like you can in the oil business, or something like that.

Q. Taking Mr. Miller's figure, with the average of $63,000 a month for nine months ending July in 1942, we have a four-month period, August, September, and October of 1942, at $63,000 a month. The earnings for that period would be $252,000.

A. Well, your arithmetic is correct, but your premise is wrong. [259]

Q. What's wrong with the premise?

A. Because you can't continue averages in the picture business, distribution or exhibition. As your picture progresses in distribution the returns get less each month.

Q. The average for nine months was the same as the average for 13 months?

A. Well, I can't quarrel with you on your arithmetic, but just on your premise.

Q. You assumed that the picture was in a declining distribution at the time you acquired it?

(Testimony of Edward C. Raftery.)

A. Of course. Every picture is in a declining distribution as it gets older.

Q. What changed your mind in a period of 18 days? A. About what?

Q. Disposing of the Lasky——

A. I didn't. My mind was made up from the beginning. Before I would make a deal with Mr. Wright I found out that I could get a purchaser. That was my mind. My distribution headed a different mind. He wanted to hang on to it, but I finally convinced him that sound judgment required that we sell it and go to our next venture.

Q. Where did United Artists acquire the money to purchase Mr. Lasky's interest?

A. Oh, we had the money.

Q. In the bank? [260] A. Yes.

Q. You didn't have to negotiate a loan?

A. Not at that time. We had negotiated a loan once before that with the Guaranty Trust Company when we went out to acquire properties and we had the money at the time.

Q. When you attempted to dispose of this interest to whom did you make offers to sell them?

A. Well, the first one I went to, was the logical one to go to, was Warners, and I concluded the deal without negotiating with anybody else.

Mr. Transue: I believe that is all, your Honor.

Redirect Examination

Q. (By Mr. Bauersfeld): At the time United Artists purchased Mr. Lasky's rights on December

(Testimony of Edward C. Raftery.)

4, 1942, in the picture "Sergeant York" did you have any other purpose in mind than a business purpose of acquiring that? A. None.

Q. And when you sold to Warners did you have any other than a business purpose in mind?

A. Only a short profit and put it in the bank for the company.

Mr. Bauersfeld: No further questions.

The Court: Mr. Raftery, I understand from your communication with the Clerk of the Court that you had to fly [261] down here after being in upstate New York, and I want to say that we are very glad to have your testimony in the case and thank you for appearing.

The Witness: I thank you for the courtesy. I finished Monday at Utica so I was able to come down on the train and now I leave for Pittsburgh for another pre-trial tomorrow morning.

The Court: Lawyers these days have to travel all over the country.

The Witness: Wherever you can find it.

The Court: Strenuous life.

Mr. Bauersfeld: Petitioner rests.

Mr. Transue: Respondent rests. [262]

The Court: I have a few things that I want to get into the record. If you want to be excused, go ahead, Mr. Raftery; or, if you want to wait it will only take me about five minutes.

You may be seated, please.

(Witness excused.)

The Court: I want to make a brief statement for the record. I don't know whether I will be able to write very much of a supplemental opinion in this case or not. At any rate, what I have to say now, which I think should go in the record, probably could not go in any supplemental opinion. This has to do with the procedure of the court.

Counsel are acquainted with the court's rules of practice. Of course, in rules of practice which are for the use of the bar of the court, necessarily a great many things are not set forth that have to do with the intramural procedures of the court. The problem in this case has to do with the service of papers.

We are a traveling court. In this problem, at least in the problem which has given rise to this further hearing, it is very important to keep in mind that the Tax Court is a traveling trial court, probably one of the very few traveling trial courts in the world that serves an area as large as it does. It is also a small court considering the area that it covers. [263]

Necessarily the court must make service of papers by mail. In some state courts the courts do not make service of papers. The courts have developed a procedure under which counsel in litigation makes service of papers upon each other, using some form of the court, printed form of some kind perhaps.

Now, in the Tax Court where we have to serve papers by mail we have, over the period of years, undertaken to serve all papers. We don't ask coun-

sel to serve papers on each other. Briefs, motions, everything is mailed to Washington by counsel. Then it is mailed out of Washington by the Court to opposing counsel; and with respect to orders of the court, of course they are served by mail. They would have to be served by mail.

Important papers are served by registered mail. In the area of registered mail, some of the papers that are served by the court under registered mail are served with a registered mail return receipt, or orange card, requested, but other papers served by registered mail are just served by ordinary registered mail.

Many do not understand the procedure of this court. Many attorneys appear in this court who appear only once or twice in the course of one or more years. Other attorneys who specialize in practice in this court I have found in my experience are actually not very well acquainted with the [264] internal procedures of the court, and that is often very surprising. Any other court that had to consider the procedure of this court would be at a loss to understand how we function when we are located in Washington and yet serve the whole United States.

One of the reasons I am making this statement is so that if any other court is interested the court can receive some information.

In connection with my comments about the service of papers, I have come now to the matter of the serving of the decision. To many, a decision means the opinion of the court. In the Tax Court, the

opinion of the court is part of a report. The report is a findings of fact and opinion. It is entered in the court's records first. Sometimes the word "promulgated" is used; sometimes the word "filed" is used; and sometimes the word "entered" is used. At any rate, whichever word is used, after the Division Judge who has heard and decided a case under a written findings of fact and opinion has filed it with the Chief Judge of the court it becomes the opinion of the court under statute unless the Chief Judge acts upon it in some way within thirty days. The Chief Judge usually acts upon the matter by either sending it to the Court Conference for consideration by the full court—this is the findings of fact and opinion about which I am speaking—or the Chief Judge says "I have no objection to its becoming [265] the opinion of the court. I order that it is to be filed as a Division Report," or "entered as a Memorandum Report." That is step number one.

Step number two has to do with the entry of an order. The order is called a decision. It is the judgment order and is separate. Now, when that order is entered on the court's docket it has to be served. If the decision in the case is one that, so far as the money judgment is concerned, simply confirms the determination of the Commissioner, the decision is a decision for the respondent and all that is done is to dictate an order saying there is a deficiency in the case in the amount of so many dollars, in the amount that has been determined by the Commissioner; or if the conclusion reached is

that the determination is wrong, the decision is for the petitioner, which means that the judgment says there is no deficiency.

But if the decision of the issues in that written report requires a recomputation of the tax, that is not done by the court at all. That is done by the parties and it is done under a rule in our Rules of Procedure called Rule 50, and it is stated at the end of the written report "decision will be entered under Rule 50." But we are not concerned with that in this case so I will not say any more about it, except that it takes sometimes from two to three months before the parties file with the court their Rule 50 [266] computation, and then we enter that separate order called a decision.

I'm sorry to take so long about this. I have at last come to my point. What do we do when we serve a decision by mail? That decision is typewritten, an original copy with three thin carbon copies. It goes to our mailing section, the carbon copy, and it is put in an envelope which is addressed to the first counsel of record, although there might be four or five other attorneys, and the fifth attorney to enter his appearance may have been the one who tried the case. That decision order is forwarded with no covering letter, form, notice, or anything. It is put into an envelope blank. It is sent by registered mail, but no return registered mail receipt is requested or required by the court.

Now, what happens at the other end? Mind you, we are a traveling court and we serve the whole United States, so you must then turn your camera

from the mail room of the Tax Court to the incoming mail department of a large attorney's office somewhere—on the Gulf of Mexico, on the Atlantic Coast, in the Hawaiian Islands, on the Pacific Coast; anywhere you choose—and in comes a carbon copy of something with no forwarding covering notice of any kind.

It is not surprising that when mail comes into an office in that way a young girl who is a mail clerk, a young [267] boy who is a mail clerk, or secretary, doesn't know what it's about. The boss of the office tries to anticipate problems of that kind and warn his office help.

I would like to give you, Mr. Bauersfeld, some of the printed forms of the court that are used as covering letters in serving other documents, other than decisions, and if you would like to file them in the record in this case you may do so. I call to your attention that not one of these printed forms relates to the service of the decision, and the decision in a case is one of the most important documents. It's as important as the petition.

The petition has to be filed within 90 days after the deficiency notice is issued or the taxpayer loses a statutory right to file a petition in this court.

An order of decision has to be acted upon by either party within 90 days after it is entered in the books of this court, not after it's received at the end of a mailing route; but after it's entered here, or the right of appeal is lost.

We do not have one printed form to say "Please

take notice that service is hereby made upon you of decision" in a proceeding in this court. If we have a motion filed in some matter we have a printed form, 317, which says "service is hereby made of the enclosed motion." We have another notice, Form 528-A, "Service is hereby made of respondent's answer." Or Form 532, service of answer and notice of place of trial. "Service is hereby made of the respondent's answer. Notice is hereby given," and so forth. And then there are a few others, but altogether I have obtained six forms and I think that is all.

Now, I am proposing to the Chief Judge of the court that we have printed a notice of service of the decision. I am also recommending that we make the decision look a little more impressive. I don't know whether that suggestion will be acted upon, but I feel quite sure that the other suggestion that we enclosed a printed form saying "Notice is hereby given of service upon you of the decision" and "Please take notice that the time for appeal expires 90 days from the date of the entry of the decision. See Section so and so of the Internal Revenue Code"; I'm pretty sure that that kind of form will now be printed, and at least I will do everything in my power to see that that is done.

Now, I suggest you file that in this case.

I think it is apparent to you why I can't put this in an opinion. If I did, the opinion would probably have to be reviewed by the whole court, but I think that in this case, for the purposes of an Appellate Court, this explanation might be helpful

because it's very hard to find out what our procedure is like.

Mr. Bauersfeld. If the court please, on behalf of the petitioner I would like to offer at this time as one [269] exhibit, six forms of the Tax Court which are used when papers are served upon counsel.

The Court: That is received as the exhibit next in order.

The Clerk: That will be exhibit 11.

(Petitioner's Exhibit 11 was received in evidence.)

The Court: I have one other thing to cover.

Petitioner's counsel in filing a brief for a further consideration of this case has cited some authorities which deal with procedure in a federal bankruptcy court. I have considered those and of course to make any analogy comparing this court with the bankruptcy court is difficult, but I would like to point out now that this court doesn't have any term. A bankruptcy court doesn't have a term. This court is continuously in session. Although this further hearing has been taken up in January of 1955, this has been unavoidable due to the work in my division of the court and other calendars, which is chiefly because I have been busy.

The motion for reconsideration was filed, I would say, as promptly as it could be after the general situation was known, and if the court had been able to do so it would have been taken up as soon as this motion was filed. There have been a couple of hearings on the motion and that has taken some

time, but, for example, the report in this case [270] was filed in May, I believe, of 1954. That wasn't during any term of the court. There wasn't any term of the Tax Court that ended on July 1, for example. We are continuously in session.

For example, we have our court conferences during the summer as late as it appears to be convenient and as long as it's possible to get a quorum of the court together. The Judges of the court take vacations in just the same way as any Civil Service employee does. They go on annual leave, so to speak, for a week, two weeks, or not more than 26 or 29 days, depending on what each Judge wants to do in connection with the work that he has in his office. Many of the Judges take only a one-week vacation.

This court doesn't take a summer recess. It doesn't recess on July 1 or June 1 and convene again on October 1 or September 1.

In this court we have a motion calendar on Wednesdays. That motion calendar is held continuously throughout the year. If one week is missed it is simply because there isn't enough to put on the motion calendar or someone can't handle the motion calendar. So there is that much analogy to some of the cases cited by the petitioner, to that extent: that this court does not have any terms and that the motion for reconsideration was filed as promptly as could be under the circumstances.

We have had briefs in this case. I really don't see the need for the filing of supplemental briefs. You have asked the court to give the matter

further consideration of the question that was originally presented. The court has heard some additional testimony. Briefs have been filed on the matter regarding the court giving this matter further consideration, and so unless counsel wish to file supplemental briefs I am not going to ask for any.

On the other hand, if counsel wants to file a supplemental brief it will have to be filed within a very short time.

Mr. Bauersfeld?

Mr. Bauersfeld: I would appreciate the opportunity of filing one and I will file one any time the court will set.

The Court: And Mr. Transue?

Mr. Transue: If Your Honor please, our position has been that there has been no ground for a re-hearing, and there has been no newly discovered evidence or any other justification for a re-hearing.

Of course, we still maintain our contention that the court is without any jurisdiction to give any further consideration to the matter. If Your Honor permits Mr. Bauersfeld to file a brief I would like to have some period thereafter to consider it and see whether I desire to file one. It seems to be his desire. Whatever period is set for him, I [272] would like to have 30 days additional to consider the advisability of making a reply.

The Court: Certainly.

On the matter of the continuing objection of the respondent I simply want to say that this seems to be an extraordinary situation and one which merited the exploring of what is involved in the court's

own procedure, and I have given you a report on that.

To what extent do you intend to go into your supplemental brief?

Mr. Bauersfeld, this case, as you know, was tried before the court by Harrison and Harkins in Los Angeles, and complete briefs have been filed. When I granted a motion for reconsideration I didn't intend in granting that motion to consider the question de novo. Do you understand?

Mr. Bauersfeld: I understand.

The Court: And I believe you prepared the brief, Mr. Bauersfeld, on the matter of whether we could exercise any discretion in the matter of giving this further consideration. Just exactly what do you want to cover in the supplemental brief?

Mr. Bauersfeld: I would like to cover in the supplemental brief only the new evidence as it may affect the prior decision of the court from a factual standpoint.

The Court: And you don't intend filing a brief to [273] reargue the case?

Mr. Bauersfeld: Not the entire case, no, Your Honor.

The Court: I think I will have to make it clear that the matter of reconsideration was gone into upon the understanding that you had some new evidence to present. The question now is what additional findings of fact should be made and to what extent the additional evidence may or should be considered in connection with the original briefs. With that understanding you may file a brief. I

don't want to give you any more than around 30 days. The 25th of February.

Mr. Transue, you may reply to that on the 25th of March.

Thank you very much.

That concludes the further hearing in the Lasky case.

(Whereupon, at 3:05 p.m., January 26, 1955, the hearing in the above-entitled matter was concluded.) [274]

[Endorsed]: T.C.U.S. Filed February 8, 1955.

RESPONDENT'S EXHIBIT D
[Admitted in Evidence Dec. 11, 1951]

This Agreement, made and entered into this 8th day of May, 1940, by and between Warner Bros. Pictures, Inc., a Delaware corporation, hereinafter referred to as the "Company", and Jesse L. Lasky, hereinafter referred to as the "Producer".

Witnesseth:

For and in consideration of the mutual covenants and agreements hereinafter contained and set forth, the parties hereto have agreed and do hereby agree as follows, to-wit:

1. The Company hereby employs and engages the Producer to render his services exclusively to the Company, except as herein specifically provided, for and during the term of this agreement, and the Producer hereby accepts such employment and agrees to perform and keep all of the duties, ob-

Respondent's Exhibit D—(Continued)

ligations and agreements assumed or entered into by him.

2. Producer agrees that he will promptly and faithfully comply with all reasonable requirements, directions, requests, rules and regulations made by the Company in connection with the conduct of its business, and that he will render services in connection with the photoplay provided for in Paragraph 3 hereof as a supervisor and/or executive, as the Company may designate, and at the option of the Company, Producer agrees to render services in connection with the editing of said motion picture, and to perform such other services as may be requested by the Company in connection with said photoplay and pertaining to the work of a supervisor and/or the overseeing of the development of the screen play which will serve as the basis therefor, but there shall be no obligation on the Company to cause or allow Producer to perform any services hereunder. The Producer agrees to perform and render his services conscientiously and to the full limit of his ability and as requested by the Company at all times, and to perform and render such services whenever and wherever and as often as the Company may request or deem necessary or convenient. Should the Producer be required to perform any services hereunder in any place other than the cities of Los Angeles and/or Burbank, California, and/or any other place to which the Company may hereafter remove its basic studio operations, and/or their environs, the Company shall pay

Respondent's Exhibit D—(Continued)

all necessary traveling expenses to and from such place or places, together with hotel bills or other charges for board and lodging of the Producer during the continuance of such services elsewhere and until his return to such place where Warners' basic studio operations are conducted.

3. The term of this contract shall commence on April 1, 1940, and shall continue thereafter for a period of fifty-two (52) weeks, unless sooner terminated as in this agreement provided. During such period, the Company shall require the services of Producer hereunder as the Supervising Producer of a photoplay tentatively entitled "The Amazing Story of Sergeant York", or such other photoplay as may be selected by mutual consent of the parties hereto.

4. Provided Producer shall faithfully and completely perform each and every condition of this agreement on his part to be kept and performed, the Company shall pay to Producer as compensation for his services and all rights herein granted, the sum of Fifteen Hundred Dollars ($1500.00) per week during at least forty (40) weeks of said term, or a guaranteed aggregate compensation of Sixty Thousand Dollars, ($60,000.00), payable in weekly installments during such term. Each weekly installment shall be payable on Wednesday of each week for services rendered up to and including the Saturday preceding. In the event the photoplay contemplated hereunder shall be completed and made ready for public release prior to the time Producer shall

Respondent's Exhibit D—(Continued)

have received said guaranteed aggregate compensation of Sixty Thousand Dollars ($60,000.00), then upon such completion of said photoplay the Company will pay to Producer any unpaid balance of said guaranteed aggregate compensation in four (4) equal weekly installments, unless such equal weekly installments would be less than the regular weekly installments above provided for, in which event,—that is to say, in the event the then unpaid balance is less than Six Thousand Dollars ($6,000.00), the entire unpaid balance shall be paid Producer at such time.

5. Producer agrees, both during and after said term, to cooperate in every manner and to the best of his abilities and opportunities with the Company, and particularly with its publicity department, in connection with the exploitation and publicity of the said photoplay, and that such cooperation shall include, without being limited to, each and every radio program or series of programs with which Producer may be associated or which he may present.

6. Producer agrees that he will, during the term hereof, render the services herein provided for solely and exclusively for and to the Company and that he will not, during such time, render any services for or in any other phonographic, stage, or motion picture production or productions, art or business of any other person, firm or corporation, or make any public or private appearances in any

Respondent's Exhibit D—(Continued)

way connected with dramatic, theatrical, radio, television or motion picture production or shows or phonographic recordations, or engage in any other similar occupation without the written consent of the Company being first had and obtained, and that he will neither consent to nor permit any other person, firm or corporation to advertise, announce or make known, directly or indirectly, by paid advertisements, press notices, or otherwise that he has contracted to do or perform any act or service contrary to the terms of this agreement. It is specifically understood that Producer at such times and in such manner as will in no way interfere with his duties to the Company hereunder, shall be entitled to engage in, produce or develop upon his own account, a radio program or programs which may be generally described as presentations or programs in which radio versions of photoplays, stage plays, or novels, are made as the major feature thereof. It is understood, likewise, that the first duty and obligation of Producer shall be to the Company in performance of his duties hereunder, and that in case of any question or doubt as to the interference of the performance of such duties, Producer will, without respect to such outside activities render full services to the Company. In any event, should Producer develop such radio program or programs, the then current photoplay output of the Company shall receive favored treatment upon such program. It is further agreed that any exclusive grant or any exclusive agreement or undertaking hereinafter in-

Respondent's Exhibit D—(Continued)

cluded shall be deemed subject to the exception provided for in this Paragraph 6.

7. Producer does hereby agree to, and does hereby, grant, bargain, sell, assign and transfer to the Company, free and clear of any and all claims for royalty or other compensation except such as may be in this contract specifically set forth, all rights whatsoever in and to all and every the works that he shall write, if any, conceive, compose or produce during the full term hereof, and particularly, though without limiting the foregoing general language, the motion picture, talking picture, radio, television, phonographic, publication and dramatic rights thereunder and thereto, and does further authorize and empower the Company to secure copyrights to the same and to do all things in connection therewith which Producer might otherwise himself do or perform. Producer further agrees at the request of the Company to execute from time to time further instrument or instruments substantially in the form of the agreement hereto attached, marked "Exhibit A" and by reference made a part hereof, in order to thereby further confirm the rights of the Company in and to any or all the works of Producer as heretofore set forth, it being further understood and agreed that all rights given and granted the Company under the terms of "Exhibit A" shall be deemed incorporated herein and such rights shall be deemed granted and conveyed to the Company regardless of the execution of such subsequent instruments hereinabove provided for.

Respondent's Exhibit D—(Continued)

8. The Producer hereby grants to the Company the sole and exclusive right, during the full term hereof, to use or make use of and control his name and/or his professional name and to use and/or distribute his pictures, photographs or other reproductions of his physical likeness for advertising, commercial or publicity purposes. The Producer shall at no time during the said term, grant the right to, authorize or willingly permit any person, firm or corporation, other than the Company, to make use of his name, nor to make use of or distribute his pictures, photographs or other reproductions of his physical likeness, excepting in connection with the radio programs referred to in Paragraph 6. The Company may, in the name of the Producer or otherwise, institute any proper legal proceedings to protect or enforce the rights herein granted.

9. The Producer agrees that he will report to the Company at its studio at Burbank, California, or at any other place in any state of the U.S.A. required or desired by the Company, from time to time and at such times as the Company may designate during the period of his employment hereunder.

10. In the event that by reason of sickness or accident the Producer shall be incapacitated from performing and complying with his obligations hereunder, then at its option, the Company shall be entitled to refuse to pay Producer compensation during the period of such incapacity, and in such event the Company may, at its option, cause the

Respondent's Exhibit D—(Continued)

then current term of this agreement to be extended for a period equivalent to the period during which the Company shall be entitled to refuse to pay compensation under the provisions hereof, or, in the event of the continuance of such incapacity, for a period or aggregate of periods in excess of six (6) weeks during any period of the term hereof, the Company, at its option, may cancel and terminate this agreement.

11. It is further agreed that wherever in this contract the right is given to the Company to refuse to pay compensation to the Producer for any reason, and the Company is granted the option to extend the term hereof for an equivalent period, regardless of its cause, the Company shall have the right to exercise such option to extend the term of this contract at any time at or after it shall have elected to refuse to pay compensation to the Producer but prior to the expiration of three (3) weeks after the Producer shall have resumed the rendition of services hereunder following any such refusal to pay compensation by the Company as herein permitted.

12. In case the production or completion of motion picture productions by the Company under the terms of this agreement shall be prevented or materially hampered or interrupted by reason of any fire, casualty, strike, unavoidable accident, act of God, war, or epidemic or by the enactment of any municipal, county, state, or federal ordinance or law, or by the issuance of any executive or judicial order, whether municipal, county, state, or federal,

Respondent's Exhibit D—(Continued)

or by any other legally constituted authority, or any other cause of the same or other kind or character beyond the control of the Company, or by reason of the Company's inability, without its fault, to obtain the material, transportation, power or other essential commodity required in the conduct of its business, then and in any such event, the obligations of the parties hereto to render service or pay compensation, respectively, under this agreement, at the option of the Company shall be suspended during the continuance of such event, and, at the option of the Company, this agreement and all of its provisions herein contained may be extended for a period equivalent to the period of such suspension. In this connection, it is specifically understood that continued production by the Company is dependent upon the continued use and exhibition of its products by motion picture theatres, for which reason it is agreed that if the majority of the motion picture theatres in the United States from which the Company, directly or indirectly, derives revenue from use of its product, or if a majority of the motion picture theatres owned, controlled or operated by the Company, its subsidiaries, or affiliates, shall be closed for any reason whatsoever for a period of three (3) consecutive days or more, then the obligations of each of the parties hereto under this agreement shall, at the option of the Company, be suspended likewise for a period equivalent to the length of time said theatres shall be closed; provided, however, that such suspension may be con-

Respondent's Exhibit D—(Continued)

tinued by Producer, at its option until a time not later than two (2) weeks after such theatres have reopened, whether such period of suspension so continued shall exceed the actual period during which the said theatres have been closed or not. If any suspension of this contract under the provisions of this paragraph should continue for a period in excess of twelve (12) weeks during the term hereof, then and in that event, either the Producer or the Company, at his or its option, may elect to terminate the Producer's employment hereunder; provided, however, that should the Producer desire so to terminate his employment, he shall serve notice of such desire upon the Company, and if the Company should not resume the payment of the weekly compensation herein provided to be paid Producer during the term in which such suspension may occur, commencing as of not later than one (1) week after the receipt of such notice from the Producer, then and in that event, the employment of the Producer hereunder shall be terminated. If the Company should resume the payment of such compensation, commencing as of not later than one (1) week after the receipt of such notice, then and in that event, such election of the Producer hereunder shall not be effective, but this contract shall continue in full force and effect.

13. It is understood that the Company has purchased from the Producer, all Producer's rights to, in and under a certain agreement dated March 23, 1940, between the Producer and Alvin C. York, the

Respondent's Exhibit D—(Continued)

original of which contract has been delivered to the Company, and which rights are of value in connection with the production of the proposed photoplay, "The Amazing Story of Sergeant York", referred to in Paragraph 3 hereof. The Company shall be entitled to the services of Producer in the preparation and/or writing of the script upon which said motion picture photoplay shall be based, but it is not a condition or prerequisite to the production of said photoplay that said script shall be approved by Producer, and on the contrary Producer agrees to render his services in the complete production of said photoplay provided only said script meets with the approval of the Company. It is further understood that Producer shall work under the direct supervision of Jack L. Warner and Hal B. Wallis, or either of them, provided either of them remain in the employ of the Company during the term hereof; otherwise, Producer shall work under the direct supervision of such person or persons as shall replace said J. L. Warner and/or Hal B. Wallis.

14. It is further agreed that Producer shall be accorded credit on the film of the photoplay produced hereunder and in all paid advertising and publicity issued by and under the direct control of the Company in approximately the following form, to-wit: "Produced by Jesse L. Lasky and Hal B. Wallis" provided, however, the Company reserves the right to alter or change the form of such credit by omitting the words "and Hal B. Wallis" or by substituting another name for that of said Wallis,

Respondent's Exhibit D—(Continued)

but nothing herein shall be deemed to require a change in the present custom of the Company to accord J. L. Warner credit as being in charge of production, or from according Hal B. Wallis credit as an executive producer. Nothing contained in this paragraph shall be construed so as to prevent so-called "teaser" and/or special advertising, publicity and/or exploitation relating to the story upon which said photoplay is based, the author, the director or similar matters, without mentioning Producer's name, or so as to prevent so-called "trailer" or other advertising on the screen without mentioning Producer's name, and no casual or inadvertent failure to comply with the provisions of this paragraph shall constitute a breach of this agreement. Should error occur in billings under the provisions of this paragraph, the Company agrees to use all reasonable effort to correct such error within a reasonable time after the occurrence of any such error has been brought to the attention of the Company by Producer.

15. Anything to the contrary in this contract notwithstanding, the Company specifically reserves and retains, and Producer specifically agrees that the Company shall have, the right to sell, transfer, assign, or otherwise dispose of this contract or the Company's rights under this contract, and the services of Producer herein set forth to any other major producer of motion pictures, in the event of which sale, transfer or disposition, Producer agrees to continue to perform his duties hereunder according

Respondent's Exhibit D—(Continued)

to the terms hereof, to or for the assignee or transferee of this contract, as above stated, subject to the provisions of Paragraph 3 hereof.

16. It is distinctly understood and agreed by and between the parties hereto that the services to be rendered by the Producer under the terms hereof, and the rights and privileges granted to the Company by the Producer under the terms hereof, are of a special, unique, extraordinary and intellectual character which gives them a peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in any action at law, and that a breach by the Producer of any of the provisions contained in this agreement will cause the Company great and irreparable injury and damage. The Producer hereby expressly agrees that the Company shall be entitled to the remedies of injunction, specific performance and other equitable relief to prevent a breach of this agreement by the Producer. This provision shall not, however, be construed as a waiver of any of the rights which the Company may have in the premises for damages, or otherwise. In addition to all other rights and remedies which the Company may have, the Company, at its option, in the event of the failure, refusal or neglect of the Producer to perform his required services hereunder to the full limit of his ability and as instructed by the Company, shall have the right to refuse to pay the Producer any compensation during the period of such failure, refusal or neglect on the part of the Producer, and shall like-

Respondent's Exhibit D—(Continued)

wise have the right either to terminate this agreement or to extend the term of this agreement then in force and all of its provisions for a period equivalent to the period during which such failure, refusal or neglect shall have continued.

17. All notices which the Company is required or may desire to give to Producer under or in connection with this agreement may be given by delivering same to Producer or by addressing same to the Producer at 181 No. Saltair Brentwood Highlands, Los Angeles or at such other place as may be designated in writing by Producer, or, in the absence of any designated or known address, to the Producer, General Delivery, Los Angeles, California, and when same shall be deposited, so addressed, postage prepaid, in the United States mail, the Company shall be deemed to have delivered such notice.

18. It is expressly agreed that if at the time of the expiration of this agreement the Producer is rendering any services hereunder deemed by the Company to be of value to it, then and in that event, Producer agrees to continue to render his services until all services required of him by the Company in connection with such production or productions have been completed, and for such excess services Producer will be paid upon a daily pro rata basis at the same rate of salary then being paid and upon the same conditions as shall then be operative under the terms hereof, and, in calculating such daily rate, a week shall be considered as consisting of six (6) days and the weekly salary being considered to be

Respondent's Exhibit D—(Continued)

the sum of Fifteen Hundred Dollars ($1500.00).

19. No waiver by the Company of any breach of any covenant of this agreement shall be deemed to be a waiver of any preceding or succeeding breach of the same or any other covenant or provision. The exercise of any option granted to Company hereunder shall not operate as a waiver of any default or breach on the part of the Producer then existing. Each and all of the several rights, remedies and options of the Company under or contained in or by reason of this agreement, shall be construed as cumulative and no one of them as exclusive of the others, or of any right or priority allowed by law. Any option or options or rights of election herein granted to either the Company or Producer may be exercised, unless herein otherwise specifically provided, by notice, orally or in writing, or delivery by any means of communication whatsoever.

20. This agreement shall be governed by and construed under and in accordance with the laws of the State of California, but shall be considered as operative and in full force and effect throughout the United States of America and its possessions, Great Britain and all the dominions, commonwealths and possessions of the British Empire, and all other countries throughout the world. Nothing herein contained shall be construed as making the term of this contract, including all possible extensions thereof, extend, or the provisions hereof enforceable against the Producer, beyond the term of seven (7) years from the commencement of service hereunder,

Respondent's Exhibit D—(Continued)

or be otherwise in contravention of Section 1980 of the Civil Code of the State of California. Nothing in this contract contained shall be construed so as to require the commission of any act contrary to law, and wherever there is any conflict between any provision of this agreement and any material statute, law, ordinance, or other governmental regulation, the latter shall prevail, but in such event the provision of this agreement affected shall be curtailed and limited only to the extent necessary to bring it within the legal requirements.

21. This agreement supersedes and cancels all other and former agreements and understandings between the parties hereto as of the commencement date hereof, except such contracts and/or agreements as may be executed between the parties concurrently herewith.

22. It is specifically agreed that this contract contains all of the terms, conditions and promises of the parties hereto in the premises and that no modification or waiver thereof or of any provision shall be valid or binding unless in writing executed by both parties hereto.

In Witness Whereof, the parties hereto have executed this agreement the day and year first above written.

WARNER BROS. PICTURES, INC.

By R. J. OBRINGER,
Company

JESSIE L. LASKY, Producer

Respondent's Exhibit D—(Continued)

EXHIBIT A

ASSIGNMENT OF ALL RIGHTS

Warner Bros. Pictures, Inc.

Know All Men By These Presents:

1. That I, ..., for and in consideration of the sum of.....Dollars ($.....), and other goods and valuable consideration to me in hand paid by Warner Bros. Pictures, Inc., a Delaware Corporation, the receipt of which sum is hereby acknowledged, have given, granted, bargained, sold, assigned, transferred and set over, and by these presents do give, grant, bargain, sell, assign, transfer and set over, forever, unto said Warner Bros. Pictures, Inc., hereinafter referred to as the "purchaser," that certain

story
adaption entitled .....
continuity

hereinafter referred as as the "work," also the title and theme thereof; together with all now or hereafter existing rights of every kind and character whatsoever pertaining to said work, whether or not such rights are now known, recognized or contemplated, and the complete and unconditional and unencumbered title in and to said work for all purposes whatsoever.

2. I further give, grant, bargain, sell, assign, transfer and set over, forever, to the purchaser, the absolute and unqualified right to use said work, in

Respondent's Exhibit D—(Continued)

whole or in part, in whatever manner said purchaser may desire, including (but not limited to) the right to make, and/or cause to be made, literary, dramatic, speaking stage, motion picture, photoplay, television, radio, and/or other adaptations of every kind and character, of said work, or any part thereof; and for the purpose of making or causing to be made such adaptations or any of them the purchaser may adapt, arrange, change, movelize, dramatize, make musical versions of, interpolate in, transpose, add to and subtract from said work, and/or the title thereof, to such extent as the purchaser in its sole discretion may desire, and may likewise translate the same into all or any languages. The purchaser shall have the right to use my name as the author of the literary composition upon which said adaptations, or any of them, are based, and shall have the further right to use the title of said work in conjunction with any adaptations of said work, or any part thereof; and/or the purchaser may use in connection with such adaptations, or any of them, any other title or titles which it may select, and/or the purchaser shall have the right to use the title of said work in connection with any literary, dramatic, or other works not based upon said work. The purchaser shall also have and is hereby given the right to obtain copyright in all countries upon said work and upon any and all adaptations thereof, including the right of acquiring copyright in all countries upon any motion pictures based in whole or in part upon said work.

Respondent's Exhibit D—(Continued)

3. Without in any manner limiting or derogating from the generality of the rights hereinabove in paragraphs 1 and 2 granted to the purchaser, I hereby particularly give, grant, bargain, sell, assign, transfer, and set over forever to the purchaser the sole and exclusive motion picture rights, talking picture rights, and synchronized picture rights throughout the word in and to said work, also the title and theme thereof, together with the sole and exclusive right, license, and privilege of using said work and title for motion picture, talking picture, photoplay, and synchronized picture purposes, also the sole and exclusive right to make motion picture films and photoplays based in whole or in part on said work, together with the right to sell, lease, license, and generally deal and traffic in the same and/or recordations and/or reproductions thereof throughout the world at any and all times after the execution hereof. The term "photoplay," as used in this instrument, shall be deemed to include, but not be limited to, motion picture productions produced, transmitted and/or exhibited with sound and voice recording and reproducing devices, radio devices and all other now existing or future improvements and devices which are now or may hereafter be used in connection with the production, transmission and/or exhibition of motion picture products. All rights necessary to produce, transmit and/or exhibit such motion picture version or versions of said work, accompanied by such sound an voice recording and reproducing devices, radio devices, and all

Respondent's Exhibit D—(Continued)

other now existing or future improvements and devices which are, now or may hereafter be used in connection with the production, transmission and/or exhibition of motion picture productions, are hereby transferred and assigned to the purchaser. The purchaser is hereby given the right to use the title of said work in conjunction with motion picture productions and photoplays based upon said work or any part thereof; but the purchaser shall not be obligated so to do and may use any other title or titles which it may select as the title of such motion picture productions and photoplays; and/or the purchaser shall have the right to use the title of said work in conjunction with motion picture productions and photoplays not based upon said work. The provisions of this paragraph shall not be deemed or construed in any manner to limit or derogate from the generality of the full and complete rights hereinabove in paragraphs 1 and 2 granted to the purchaser.

4. I hereby represent and warrant that I am the sole author and owner of said work, together with the title thereof; that I am the sole owner of all rights of any and all kinds whatsoever in and to said work, throughout the world; that there has been no publication or any other use of said work or any part thereof with my knowledge or consent anywhere in the world; that I have the sole and exclusive right to dispose of each and every right herein granted and/or purported to be granted; that neither said work nor any part thereof is in the

Respondent's Exhibit D—(Continued)

public domain, that no motion pictures or any other works have been produced which have been based in whole or in part upon said work; that I have in no way conveyed, granted or hypothecated any rights of any kind or character in or to said work, or any part thereof, to any person whomsoever, other than the purchaser, nor have I granted any right, license or privilege with respect to any of the rights herein granted and/or purported to be granted, to any person other than the purchaser; that I have not done or caused or permitted to be done any act or thing by which any of the rights herein granted and/or purported to be granted to the purchaser have been in any way impaired; and that I will not at any time execute any further agreement or agreements in conflict herewith, nor will I in any way attempt to encumber the rights herein granted, nor will I do or cause or permit to be done any act or thing by which the rights herein granted and/or purported to be granted to the purchaser may in any way be impaired. I further represent and warrant that said work is original with me in all respects, that no incident therein contained and no part thereof is taken from or based upon any other literary or dramatic work or any photoplay, or in any way infringes upon the copyright or any other right of any individual, firm, person or corporation; and that the reproduction, exhibition, or any other use by the purchaser of said work in any form whatsoever will not in any way, directly or indirectly, infringe upon the rights of

Respondent's Exhibit D—(Continued)

any individual, firm, person or corporation whatsoever.

5. I hereby appoint the purchaser my true and lawful attorney, irrevocably, but for the sole benefit of the purchaser, to institute and prosecute such proceedings as the purchaser may deem expedient to protect the rights herein granted and/or purported to be granted and/or to effect the recovery by the purchaser of damages and penalties for the infringement of said rights, and/or to secure to the purchaser the full benefit of all the rights herein granted and/or purported to be granted. The purchaser may sue in its own name and/or may use my name, and/or at its option, may join me as party plaintiff or defendant in any suit or proceeding brought for such purpose or purposes.

6. I hereby guarantee and warrant that I will indemnify, make good and hold harmless the purchaser of, from and against any and all loss, damage, costs, charges, legal fees, recoveries, judgments, penalties and expenses which may be obtained against, imposed upon or suffered by the purchaser by reason of any infringement or violation or alleged violation of any copyright or any other right of any person, firm or corporation, or by reason of or from any use which may be made of said work by the purchaser, or by reason of the breach of any term, covenant, representation, or warranty herein contained, or by reason of anything whatsoever

Respondent's Exhibit D—(Continued)

which might prejudice the securing to the purchaser of the full benefit of the rights herein granted and/or purported to be granted. The foregoing guarantees and warranties shall not apply to any changes in said work which may be made by the purchaser.

7. I hereby agree to duly execute, acknowledge and deliver, and/or to procure the due execution, acknowledgment and delivery to the purchaser of any and all further assignments and/or other instruments which in the sole judgment and discretion of the purchaser may be deemed necessary or expedient to carry out or effectuate the purposes or intent of this present instrument.

8. The term "purchaser" as used herein shall include the purchaser herein named, and as well, its successors and assigns. The purchaser may assign, transfer and grant all or any part of the rights herein granted it to any individual, firm, person or corporation, without limit, and shall enjoy its rights hereunder in perpetuity and forever, as long as any rights in said work are recognized in law or in equity, except insofar as such period of perpetuity may be shortened due to any copyrighting by the purchaser of said work and/or any adaptation or adaptations thereof, in which case the purchaser shall enjoy its rights hereunder for the full duration of such copyright or copyrights, including any and all renewals thereof.

Respondent's Exhibit D—(Continued)

In Witness Whereof, I have hereunto set my and this.....day of ....., 193..

.....(Seal)

State of California,
County of Los Angeles—ss.

On this...day of....., 193.., before me, ..., a Notary Public in and for said county and state, residing therein, duly commissioned and sworn, personally appeared..... known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that..he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

.....,
Notary Public in and for the County of Los Angeles, State of California.

Respondents Exhibit L 409

FORM 1040 — Treasury Department, Internal Revenue Service

UNITED STATES INDIVIDUAL INCOME TAX RETURN

1941

LOS ANGELES DIVISION

Tax $ 409.50
Pen. $
Int. $ 35.61
Ex.-Profits Tax $
Pen. $
Int. $
TOTAL $ 445.11

(Do not use these spaces)

For Calendar Year 1941

or fiscal year beginning ..... 1941, and ending 1942

To be filed with the Collector of Internal Revenue for your district not later than the 15th day of the third month following the close of your taxable year

PRINT NAME AND ADDRESS PLAINLY. (See Instruction C)

Name: JESSE L. LASKY (Give given names of both husband and wife, if this is a joint return)

Address: c/o Wright & Milliken, 111 W. 7th St. (Street and number, or rural route)

Los Angeles (Post office) Los Angeles (County) California (State)

Sec. 22(d) Initials Date rec'd 1-2-42
Liab. Acct's 510290 19
Prel.

Cash—Check—M. O.
Fee Payment $

INCOME

1. Salary and other compensation for personal services, $ See schedule		$150,855	89
2. Dividends. Line SEP 30 1943			
3. Interest on (a) bank deposits, notes, etc., $ (b) corporation bonds, $			
4. Interest on Government obligations, etc., (a) From line (h), Schedule A, $; (b) from line (i), Schedule A, $			
5. Rents and royalties. (From Schedule B)			
6. Annuities			
ITEMS 7, 8, AND 9, BELOW (AND PAGES 3 AND 4) NEED NOT BE CONSIDERED UNLESS YOU HAVE INCOME (OR LOSS) IN ADDITION TO ITEMS ABOVE.			
7. (a) Net short-term gain (or loss) from sale or exchange of capital assets. (From Schedule F)			
(b) Net long-term gain (or loss) from sale or exchange of capital assets. (From Schedule F)		2,806	50
(c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule G)			
8. Net profit (or loss) from business or profession. (From Schedule H)			
(State fiscal period from line 1, Schedule H, $)			
9. Income (or loss) from partnerships, fiduciary income, and other income. (From Schedule D)			
10. Total income (add lines 1 to 9)			$147,449 39

DEDUCTIONS

11. Contributions paid. (Explain in Schedule C)	$		
12. Interest. (Explain in Schedule C)			
13. Taxes. (Explain in Schedule C) State income tax		588	93
14. Losses from fire, storm, shipwreck, or other casualty, or theft. (Explain in Schedule C)			
15. Bad debts. (Explain in Schedule C)			
16. Other deductions authorized by law. (Explain in Schedule C)			
17. Total deductions in items 11 to 16			588 93
18. Net income (item 10 minus item 17)			$146,860 46

COMPUTATION OF TAX

19. Net income (item 18 above)			$146,860	46	25. Normal tax (4% of item 23)	$ 5,788 42
20. Less: Personal exemption. (From Schedule D-1)	$ 750	00			26. Surtax on item 22. (See Instruction 27)	79,751 80
21. Credit for dependents. (From Schedule D-2)			750	00	28. Total (item 26 plus item 27)	$ 85,540 22
					29. Total tax (From 28 or line 14, Schedule F)	$ 86,634 75
22. Balance (surtax net income)			$146,110	46	30. Less: Income tax paid at source	$
23. Less: Item 4 (a) above	$				31. Income tax paid to a foreign country (Attach Form 1116)	
24. Earned income credit. (From Schedule E-1 or E-2)	1400	00	1,400	00		
25. Balance subject to normal tax			$144,710	46	32. Balance of tax (item 29 minus items 30 and 31)	$ 86,634 75

I/we swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us and is, to the best of my/our knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the Regulations issued under authority thereof.

Subscribed and sworn to by Jesse L. Lasky before me this 4th day of March, 1942.

Claire Barrett Notary Public

Jesse L. Lasky (Signature of taxpayer)

(Signature)

A return made by an agent must be accompanied by power of attorney. (See Instruction E.) If this is a joint return (not made by agent), it must be signed by both husband and wife. It must be sworn to before a proper officer by the person preparing the return.

IF THIS RETURN WAS PREPARED FOR YOU BY SOME OTHER PERSON, THE AFFIDAVIT ON PAGE 4 MUST BE EXECUTED)

INTERNAL REVENUE AGENT IN CHARGE OCT 15 1942 LOS ANGELES, CALIF.

SEE THE COURT OF TAX APPEALS DOCKET NO. 263-96 ENTERED IN EVIDENCE DEC 11 1951 RESPONDENT'S EXHIBIT L 97

410 Respondents Exhibit L

Form 1099
TREASURY DEPARTMENT
Internal Revenue Service
UNITED STATES
INFORMATION RETURN FOR CALENDAR YEAR 1941

INSTRUCTIONS TO PAYORS

Prepare one of these forms for each payee in accordance with the instructions on return Form 1096.

Do not include payments to nonresident aliens reported on Form 1042.

Forward with return Form 1096 to reach the Commissioner of Internal Revenue Returns Distribution Section, Washington, D. C., on or before February 15, 1942.

TO WHOM PAID (Full name and home address): Jesse L. Lasky
181 No. Saltair,
Brentwood, Calif.
(If employee is a married woman, name of husband should also be furnished)

SOCIAL SECURITY NUMBER
MARITAL STATUS ☐ MARRIED ☐ SINGLE

KIND AND AMOUNT OF INCOME PAID

SALARIES, WAGES, FEES, COMMISSIONS, BONUSES (If single $750 or more; if married $1,500 or more)	INTEREST ON NOTES, MORTGAGES, ETC. ($750 or more aggregate amount of above items)	RENTS AND ROYALTIES	OTHER FIXED OR DETERMINABLE INCOME	FOREIGN ITEMS ($750 or more)	DIVIDENDS ($100 or more) (Total Paid, Including Amounts Claimed Non-taxable)
$	$	$	$	Stock $ 261 000	00

INCOME TAX REQUIREMENTS
A single person is required to file an income tax return if the aggregate amount reported on the form is $750 or more. A married person is required to file a return if the aggregate amount reported on this form is $1,500 or more. AN INCOME TAX RETURN FORM MAY BE OBTAINED FROM COLLECTOR OF INTERNAL REVENUE FOR YOUR DIST.

BY WHOM PAID (Name and address): WARNER BROS. PICTURES, INC.
BURBANK, CALIFORNIA

1099 INFORMATION RETURN FOR CALENDAR YEAR 1941 OF DIVIDEND PAYMENTS OF $100 OR MORE

BY WHOM PAID

THE INTERNATIONAL NICKEL COMPANY OF CANADA, LIMITED 3
COPPER CLIFF, ONTARIO, CANADA

[redacted]
CITIZEN OR RESIDENT OF UNITED STATES

TO WHOM PAID

MRS. BESSIE LASKY
181 NO. SALTAIR AVE.,
BEL: LOS ANGELES, CALIF.

DIVIDENDS

TOTAL	150 —

ADDRESS ALL INQUIRIES TO
BANKERS TRUST COMPANY, NEW YORK, N. Y.
DIVIDEND DISBURSING AGENT

Form 1099
TREASURY DEPARTMENT
Internal Revenue Service
UNITED STATES
INFORMATION RETURN FOR CALENDAR YEAR 1941

INSTRUCTIONS TO PAYORS

Prepare one of these forms for each payee in accordance with the instructions on return Form 1096.

Do not include payments to nonresident aliens reported on Form 1042.

Forward with return Form 1096 to reach the Commissioner of Internal Revenue Returns Distribution Section, Washington, D. C., on or before February 15, 1942.

TO WHOM PAID (Full name and home address): JESSE L LASKY SR
181 No Saltaire Ave
Brentwood Heights, Calif.
(If employee is a married woman, name of husband should also be furnished)

SOCIAL SECURITY NUMBER 551 05 1965
MARITAL STATUS ☐ MARRIED ☐ SINGLE

KIND AND AMOUNT OF INCOME PAID

SALARIES, WAGES, FEES, COMMISSIONS, BONUSES (If single $750 or more; if married $1,500 or more)	INTEREST ON NOTES, MORTGAGES, ETC. ($750 or more aggregate amount of above items)	RENTS AND ROYALTIES	OTHER FIXED OR DETERMINABLE INCOME	FOREIGN ITEMS ($750 or more)	DIVIDENDS ($100 or more) (Total Paid, Including Amounts Claimed Non-taxable)
$ 66 500 00	$	$	$	$	$

INCOME TAX REQUIREMENTS
A single person is required to file an income tax return if the aggregate amount reported on the form is $750 or more. A married person is required to file a return if the aggregate amount reported on this form is $1,500 or more. AN INCOME TAX RETURN FORM MAY BE OBTAINED FROM COLLECTOR OF INTERNAL REVENUE FOR YOUR DIST.

BY WHOM PAID (Name and address): WARNER BROS. PICTURES, INC.
BURBANK, CALIFORNIA

Schedule D.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 30 AND 31. (See Instructions 30 and 31)

(1) Personal Exemption

Status	Number of persons entitling you to credit in each status	Credit claimed
Single, or married and not living with husband or wife, and not head of family		$
Married and living with husband or wife	12	750 00
Head of family (explain below)		

(2) Credit for Dependents

Name of dependent and relationship	Number of months during the year: Under 18 years old	18 years or over	Credit claimed

Reasons for support if 18 years or over

Schedule E.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 34)

(1) If your net income is $5,000 or less, use only this part of schedule

Net income (item 18, page 1)	$	
Earned income credit (10% of net income, above)		

(2) If your net income is more than $5,000, use only this part of schedule

Earned net income (not more than $14,000)	$4,000 00
Net income (item 18, page 1)	146,860 46
Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than $100)	1,400 00

QUESTIONS

1. State your principal occupation or profession: Motion Picture producer
2. Name and address of employer: Independent producer
3. Did you file a return for any prior year? Yes If so, what was the latest year? 1940 To which Collector's office was it sent? Sixth District
4. If separate return was made for the current year: (a) Name of husband or wife: Bessie Lasky (b) Personal exemption, if any, claimed therein: $750 (c) Collector's office to which it was sent: 6th District
5. Check whether the return was prepared on the cash [X] or accrual [ ] basis.
6. Was any part of the increase in net income for current and prior years in the nature of compensation for services rendered over a period of more than 36 months? No If so, attach statement listing obligations earned and computation of the earned income. Report such income as interest in item 9 or 4, page 1, whichever applicable.
7. Did you receive during the taxable year any nontaxable income other than interest reported on Schedule A (see Instruction 12)? No If so, attach schedule showing source, nature, and amount of such income.
8. Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined by section 501 of the Internal Revenue Code? No

Respondent's Exhibit L—(Continued)

JESSE L. AND BESSIE LASKY
1940 INCOME TAX

INCOME

Warner Bros. Pictures, Inc.	$ 66,500.00
Warner Bros. Pictures, Inc.	7,500.00
Warner Bros. Pictures, Inc.: (Payment per Contract re "Life of Mark Twain")	50,000.00
Warner Bros. Pictures, Inc.: (Reimbursement by Warner Bros. for sum of $10,000, personally paid out to Harold M. Sherman to close contract with Mark Twain Company for motion picture, radio and television rights to "Life of Mark Twain")	10,000.00
Warner Bros. Pictures, Inc.: (Payment per Contract re "Connecticut Yankee in King Arthur's Court")	18,500.00
Warner Bros. Pictures, Inc.: (Share of Gross Film Rentals from release of "Sergeant York"	196,216.80
Dividends	603.00
One Year's interest on Victor Clarke note	129.50
	$349,419.30

DEDUCTIONS

Taxes:		
Real Estate and Personal Property Tax	$ 1,877.38	
Employer's Social Security Tax	315.41	
California Unemployment Tax	30.00	
Registration and Vehicle License Tax	37.40	
Tax on Theatre and Fight Tickets	50.79	
Club Taxes (Motion Picture Academy, Hillcrest, Beach Club, Masquers, Riviera)	64.62	
Tax on Telegrams	5.60	
		$ 2,381.20

Respondent's Exhibit L—(Continued)

DEDUCTIONS—(Continued)

Contributions:		
Los Angeles Community Chest	$	750.00
United Jewish Welfare Fund		500.00
Motion Picture Relief Fund		160.00
University Religious Conference		100.00
Friends of Democracy		100.00
B'nai B'rith		125.00
Greek War Relief Fund		50.00
United Service Organizations		50.00
British War Relief		30.00
Natal. Foundation for Infantile Paralysis		10.00
Federation Jewish Welfare Organizations		10.00
Amer. Red Cross (Van Nuys Aux. Benefit)		10.00
Vista Del Mar Child-Care Service		10.00
Warner Club Benefit		10.00
Friends of 2nd Regiment—State Guard		10.00
Hollywood Guild		5.00
American Field Service—Eagle Club		5.00
St. John's Military Academy		5.00
	$	1,940.00
Interest Payments	$	2,353.30
Advertising and Publicity		
Hollywood Reporter		558.75
Variety		594.66
Motion Picture Herald		153.25
Box Office Digest		128.75
Film Daily		10.00
Motion Picture Daily		10.00
	$	1,455.41
Legal Expense (Business only)	$	600.00
Business Expenses		
Randolph Rogers, assistant	$	4,300.00
Julius Evans, asst. writer		2,300.00
Dues Picture Pioneers, Inc.		20.00
Dues Mark Twain Asso. of America		5.00

Respondent's Exhibit L—(Continued)

DEDUCTIONS—(Continued)

Business Expenses—(Continued)

Dues Natl. Asso. of Audubon Societies..	5.00
Dues Academy M.P. Arts & Sciences and Masquers Club	32.00
To close contract with Mark Twain Estate for motion picture, radio and television rights to "Life of Mark Twain"	10,000.00
To close contract with Mark Twain Estate for option to purchase motion picture rights to "Connecticut Yankee in King Arthur's Court"	1,000.00
Entertainment expenses including theatre tickets, for motion picture producers, executives, actors, actresses, writers, agents, etc., business lunches, dinners, and entertaining at home.....	1,199.50
Final bills paid in 1941 in connection with loss sustained on "Quiet Please" stage show personally financed and produced in 1940	72.88
Expenses incurred business telegrams and telephone: incidental office supplies....	171.76
Expenses incurred in connection with screening "Sergeant York" for pupils of York High School at Star Theatre, Jamestown, Tenn.	121.60
Employment of writer and stenographer-preparation of biographical novel "Supreme Adventure"—(Life of Jesse L. Lasky)	1,970.17
Employment of Harold M. Sherman (Mark Twain Biographer) to write "Mark Twain" treatment	5,000.00

Respondent's Exhibit L—(Continued)

DEDUCTIONS—(Continued)

Business Expenses—(Continued)			
Expenditures conducting negotiations to obtain contract with Mark Twain Estate for purchase of picture rights to film "Life of Mark Twain" as per attached statement		12,554.41	
Loan made to Jack Wilkins, May, 1940 uncollectible		200.00	
		$39,002.62	
Automobile Expense:			
Purchased Nov. 22, 1940	$1,400.00		
Depreciation at 25%	$ 350.00		
Maintenance	500.00		
Chauffeur	1,560.00		
	$2,410.00		
One-half of use in business		$ 1,205.00	
		$48,937.53	48,937.53
			$300,511.77

Reported by Jesse L. Lasky.....$150,255.89
Reported by Bessie Lasky..... 150,255.88

Respondents Exhibit L

STATEMENT OF EXPENDITURES

ACCOUNT "MARK TWAIN"

--o--

Expenses of Walter L. Bruington, Attorney, to New York January 16th to January 28th, 1941	$ 342.85
Return transportation to New York for Harold J. Sherman, Writer - June 13th	134.85
Expenses of Walter L. Bruington, to New York - July 3rd to July 14th	319.93
Conference at Lake Arrowhead July 19th with Messrs. Bruington, Evans and Chamilee	84.94
Legal Services - Walter L. Bruington - account negotiating contract for Mark Twain story	10,000.00
Allen's Press Clipping Service	23.90
Long Distance 'phone calls to Mr. Lamb of Mark Twain Estate	165.48
Services of Stenographers	290.43
Payment on Option Extension Agreement	1,000.00
Trip to Hannibal, Missouri for Anniversary of Mark Twain Ceremonies	192.65
Total	$12,884.41

415A

Respondents Exhibit L

LONG TERM CAPITAL GAINS AND LOSSES

Kind of Property	Date Acquired	Date Sold	Sale Price	Cost	Profit	Gain or Loss to be Taken
100 20th Century Fox	3-4-36	10-21-41	$ 829.68	$3170	2340.32	$1170.16
100 Int. Nickel	3-15-39	10-24-41	2774.49	5173	$2398.51	$1199.25
500 Alscott Oil	3-27-37	12-31-41 Worthless	0	500	500.00	250.00
1000 D.C.Dery Bond	1925	12-31-41 Liquidated	12.82	1000	987.18	493.59
100 Shu Shaver	12-31-31	12-31-41 Dissolved	0	5000	5000.00	2500.00
						5613.00

Reported by Jesse L. Lasky $2806.50

Reported by Bessie Lasky $2806.50

Respondents Exhibit L 416

DETACH PAGES 3 AND 4 IF NOT USED

Schedule F.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS. (See Instruction 7)

1. Kind of property (If necessary, attach statement of descriptions details not shown below)	2. Date acquired (Mo. Day Year)	3. Date sold (Mo. Day Year)	4. Gross sales price (contract price)	5. Cost or other basis	6. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913	7. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (explain on Schedule J)	8. Gain or loss (column 4 plus column 7 minus the sum of columns 5 and 6)	9. Per cent age	Gain or loss to be taken into account 10. Amount
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 18 MONTHS									
			$	$	$	$	$	100	$
								100	
								100	
								100	
Total net short-term capital gain or loss (enter in line 1, column 3, of summary below)									$
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 18 MONTHS BUT NOT FOR MORE THAN 24 MONTHS									
			$	$	$	$	$	66⅔	$
See schedule								66⅔	
								66⅔	
								66⅔	
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 24 MONTHS									
			$	$	$	$	$	50	
								50	
See schedule								50	
								50	
Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)									$

SUMMARY OF NET CAPITAL GAINS OR LOSSES

1. Classification	2. Net short-term capital loss of preceding taxable year (not in excess of part on same list for such year)	3. Net gain or loss to be taken into account from column 10, above		4. Net gain or loss to be taken into account from partnerships and common trust funds		5. Total net gain or loss to be taken into account on column 2, 3, and 4 of this summary	
		Gain	Loss	Gain	Loss	Gain	Loss
1. Total net short-term capital gain or loss (enter as item 7 (a), page 1, amount of gain shown in column 5)	$	$	$	$	$	$	No net loss allowable (see Instruction 7)
2. Total net long-term capital gain or loss (enter as item 7 (i), page 1, amount of gain or loss shown in column 5)		$	$	$	$	$	$

COMPUTATION OF ALTERNATIVE TAX

Use only: If you had a net long-term *capital gain*, and item 22, page 1, exceeds $12,000, or
If you had a net long-term *capital loss*, and such loss plus item 22, page 1, exceeds $12,000

1. Net income (item 18, page 1). (See Instruction 7)	$146,661 48	11. Normal tax (4% of line 9)	$ 5,200 68
2. (a) Net long-term capital gain (item 7 (i), page 1)	2,808 50	12. Surtax on line 9. (See Instruction 27)	81,576 02
(b) Net long-term capital loss (item 7 (i), page 1)		13. Partial tax (line 10 plus line 11)	87,476 70
3. Ordinary net income (line 1 minus line 2 (a) or line 1 plus line 2 (b)). (See Instruction 7)	$149,656 98	13. (a) 30% of net long-term capital gain (30% of line 2 (a))	
4. Less: Personal exemption. (From Schedule D-1)	$750 00	(b) 30% of net long-term capital loss (30% of line 2 (b))	841 95
5. Credit for dependents. (From Schedule D-2)	750 00	14. Alternative tax (line 12 plus line 13 (a) or line 12 minus line 13 (b))	$ 86,634 75
6. Balance (surtax net income)	$148,916 98		$ 85,540 22
7. Less: Item 4 (a), page 1	$	15. Total normal tax and surtax (item 28, page 1)	
8. Earned income credit. (From Schedule E-1 or E-2). (See Inst. 7)	1400 00 1,400 00	16. Tax liability (if a net long-term capital gain, on line 2 (a), enter line 14 or line 15, whichever is the lower; if a net long-term capital loss, on line 2 (b), enter line 14 or line 15, whichever is the greater). (Enter as item 29, page 1)	$ 86,634 75
9. Balance subject to normal tax	$147,516 98		

Schedule G.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS
(See Instruction 7)

1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913	6. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (explain on Schedule J)	7. Gain or loss (column 3 plus column 6 minus the sum of columns 4 and 5)
		$	$	$	$	$
Total net gain (or loss) (enter as item 7 (c), page 1)						$

State the family, fiduciary, or business relationship to you, if any, of purchaser of any of the items on this page

If any of such items were acquired by you other than by purchase, explain fully how acquired

AFFIDAVIT. (See Instruction E)

(If this return was prepared for you by some other person, the following affidavit must be executed)

I/we swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this 4th day of March, 1922.

Anita Barrett - Notary Public

(Signature and title of officer administering oath)

Deborah S. Swan

(Signature of person preparing the return)

(Signature of person preparing the return)

(Name of firm or employer, if any)

RESPONDENT'S EXHIBIT O

[Admitted in Evidence Dec. 11, 1951]

Mr. Jesse L. Lasky, December 18, 1941
c/o Warner Bros. Pictures, Inc.
Burbank, California

Dear Sir:

In accordance with agreement between yourself and this Company, dated May 15th, 1940, we are submitting herewith statements covering distribution of production "Sergeant York" within the United States of America, from first release to and including November 23th, 1941. We have not as yet received any reports covering rentals derived from distribution of the production within the Dominion of Canada and foreign countries.

You will note from the enclosed statements that your share of gross rentals amounted to $21,216.80 and for which check is enclosed to cover.

Yours very truly,

Warner Bros. Pictures, Inc.

.....
Auditor

OVRT:M—encl.

cc to Messrs. S. Carlisle, J. L. Warner, Loyd Wright, T. J. Martin, S. Schneider.

Warner Bros. Pictures, Inc.

Statement of Income from Distribution of Production "Sergeant York" and Participant's Share to November 29th, 1941:

Gross Income from distribution of production "Sergeant York" within the United States of America	$1,706,084.02
Less:	
Gross rentals (United States) in which participant does not share	1,600,000.00
Net on which Participant shares	$ 106,084.02
Participant's Share—20%	$ 21,216.80

(typed 12/18/41) CVRT:M

RESPONDENT'S EXHIBIT P
[Admitted in Evidence Dec. 11, 1951]

Mr. Loyd Wright, May 6, 1942
c/o Wright & Millikan,
111 West Seventh Street,
Los Angeles, California

Dear Sir:

As requested by Mr. Jesse L. Lasky we are enclosing herewith statement showing income from distribution of production "Sergeant York" (Domestic and Foreign) to February 28, 1942 together with your share thereof. Also enclosed herewith is check, payable to Jesse L. Lasky in the amount of $244,529.84 covering the amount shown by the statement to be due.

Yours very truly,

Warner Bros. Pictures, Inc.

....

Auditor

CVRT:M—encl.

cc. to S. Carlisle, J. L. Warner, S. Schneider, T. J. Martin.

Schedule "A"

Warner Bros. Pictures, Inc.

Income from Distribution of Production "Sergeant York" and Jesse L. Lasky's Share Thereof to February 28, 1942

		Participant's Share	
		%	Amount
Domestic Income:			
US Gross Feature and Score Rentals to Feb. 28, 1942	$ 3,758,978.57		
Less:			
Amount on which participant does not share (per amended agreement, dated Dec. 31, 1941)	2,580,000.00		
Net on which participation is figured	$ 1,178,978.57	25%	$294,744.64
Foreign Income:			
Income to Feb. 28, 1942 (per Schedule "B")	85,613.15		
Income on which participant does not share	150,000.00		
Actual Income under clearance figure	$ 64,386.85*		
Total Participant's Share to February 28, 1942			$294,744.64

		Participant's Share %	Amount
Deduct:			
Payments made Dec. 7, 1941....$	21,216.80		
Your share of Cost of Advertising Campaign (per agreement dated April 30, 1942).....	18,998.00		40,214.80
			$254,529.84
Less—Amount withheld (per note below).....			10,000.00
Balance covered by attached check.....			$244,529.84

Note: The sum of $10,000.00 has been withheld at this time by reason of the claim of alleged Skeyhill heirs.

* Figures in red.

(typed 5/5/42) CVRT:M

Schedule "B"

Warner Bros. Pictures, Inc.

Foreign Income from Distribution of Production "Sergeant York" to February 28th, 1942

		Foreign Currency						
			Less:				Less: Turnover and N. Y. Share Taxes	Net
Country	Currency	Gross Billings	Charges	Restricted Funds	Net	U.S. Dollars	US Dollars	US Dollars
uba	Pesos	1,411.00				$ 1,408.95	$ 46.50	$ 1,362.45
			(1)					
ngland	Pounds	£7,957-9-0	£2,500-0-0	£3,070-4-4	£2,387-1-8	9,548.93		9,548.93
lexico	Pesos	4,531.00			4,531.00	932.41	51.28	881.13
anama	Balboa					9,124.32		9,124.32
uerto Rico	US Dollars					3,142.88		3,142.88
enezuela	Bolivar	5,566.00			5,566.00	1,477.87		1,477.87
utright Sales						3,450.00		3,450.00
			(2)					
anada	Dollars	69,908.11	6,990.91		62,917.30	56,625.57		56,625.57
						$85,710.93	$ 97.78	$85,613.15

1) Represents proportionate share of British Quota Loss.
2) Represents Canadian Remittance taxes.

typed 5/6/42) CVRT:M

RESPONDENT'S EXHIBIT Q

[Admitted in Evidence Dec. 11, 1951]

[Letterhead of Wright and Millikan]

Registered: Return Receipt Requested:

Mr. T. J. Martin, June 3rd, 1942
Auditor, Warner Bros. Pictures, Inc.,
321 West 44th Street, New York, N. Y.

Dear Mr. Martin:

I have been absent from my office for some weeks and upon my return I find your letter of May 6th, enclosing check payable to Jesse L. Lasky in amount of $244,529.84, together with the accounting under which the check was sent.

I am unable to accept the check for Mr. Lasky under the conditions as sent, and I am therefore returning it to you herewith.

Very truly yours,

/s/ Loyd Wright

LW/AG—Enc.

RESPONDENT'S EXHIBIT R
[Admitted in Evidence Dec. 11, 1951]

New York Trust Company, 100 Broadway, New York, N. Y.—1-114 WNY No. 730

Warner Bros. Pictures, Inc.

Date: May 6, 1942

Pay The Sum of $244529 and 84c.....Dollars
To Order of $244,529.84
Jessie L. Lasky
c/o Warner Bros. Pictures, Inc.
Burbank, Calif.

Warner Bros. Pictures, Inc.
/s/ [Illegible]
/s/ T. J. Martin

Void if Detached—Description Amount
Vo. No. 40665
Your share of income from distribution of production "Sergeant York" per statements rendered as of Feb. 28, 1942....$244,529.84
HL Stamped: Void

[In longhand]: Canceled 12/22/42 per T. J. Martin.

RESPONDENT'S EXHIBIT S
[Admitted in Evidence Dec. 11, 1951]

Mr. Loyd Wright July 10, 1942
c/o Wright & Millikan
111 West Seventh Street, Los Angeles, California

Dear Sir:

As requested by Mr. Jesse L. Lasky, we are en-

closing herewith statement showing income from distribution of production "Sergeant York" (Domestic and Foreign) to May 30th, 1942 together with his share thereof. Also enclosed herewith is check, payable to Jesse L. Lasky in the amount of $132,692.08 covering the amount shown by the statement to be due.

Yours very truly,

Warner Bros. Pictures, Inc.

.....

Auditor

CVRT:W—encl.

cc. to S. Carlisle, J. L. Warner, S. Schneider, T. J. Martin.

Schedule "A"

Warner Bros. Pictures, Inc.

Income from Distribution of Production "Sergeant York" and Jesse L. Lasky's Share Thereof to May 30, 1942

		%	Lasky's Share Amount
Domestic Income			
U. S. Gross Feature & Score Rentals to May 30, 1942:	$4,191,209		
Less:			
Amount on which Participant does not Share (per amended agreement, dated Dec. 31, 1941):	2,580,000.00		
	$1,611,209.74	25%	$402,802.43

		%	Lasky's Share Amount
Foreign Income:			
Income to May 30, 1942 (per Schedule "B")	$ 248,537.15		
Less:			
Income on which Participant does not share	150,000.00		
	$ 98,537.15	25%	24,634.29
Total:			$427,436.72
Less:			
Lasky's Share of Cost of Advertising Campaign (per agreement, dated April 30, 1942):			18,998.00
Net:			$408,438.72
Less:			
Payments made to date:	$265,746.64		
Amount withheld at this time by reason of the claims of alleged Skeyhill heirs:	10,000.00		275,746.64
Balance:			$132,692.08

Schedule "B"

Warner Bros. Pictures, Inc.

Foreign Income from Distribution of Production "Sergeant York" to May 30, 1942

		Foreign Currency					
Country	Currency	Gross Billings	Taxes	Less Restricted Billings	Quota Losses	Net Billings	Net Billings U. S. Currency
Cuba	Pesos	4,738.00	109.80	—	—	4,628.20	$ 4,626.15
England	Pounds	79,185-14-0	—	53,029-19-9	2,400-0-0	23,755-14-3	95,616.75
Mexico	Pesos	65,474.00	3,351.87	—	—	62,122.13	12,788.34
Panama	U.S. Dollars	9,900.67	—	—	—	9,900.67	9,900.67
Puerto Rico	U.S. Dollars	6,377.58	—	—	—	6,377.58	6,377.58
Canada	Can. Dol'rs	117,764.45	11,776.45	—	—	105,988.00	95,389.20
Outright Sales	U.S. Dollars	4,498.34	—	—	—	4,498.34	4,498.34
Australia	Pounds	4-10-0	-3-9	4- 6- 3	—	—	—
New Zealand	Pounds	1- 0-0	-3-2	-16-10	—	—	—
Argentina	Pesos	36,565.00	914.13	—	—	35,650.87	8,275.74
Egypt	Pounds	2,397,100	23,373	815,612	—	1,558.115	6,408.21
India	Rupee	6,752-0-0	144-13-4	4,412-12-3	—	2,194-14-5	659.48
Uruguay	Pesos	504.00	1.51	—	—	502.49	264.29
Venezuela-Caracas	Bolivar	13,764.00	—	—	—	13,764.00	3,732.40
						Total	$248,537.15

RESPONDENT'S EXHIBIT T

[Admitted in Evidence Dec. 11, 1951]

[Letterhead of Warner Bros. Pictures, Inc.]

West Coast Legal Dept. July 14, 1942

Mr. Loyd Wright
c/o Wright & Millikan
111 West Seventh Street
Los Angeles, California

Dear Loyd:

At the express request of our New York office I am delivering to you, statement showing income from distribution of the production "Sergeant York" (Domestic and Foreign) to May 30, 1942, together with a check payable to Jesse L. Lasky in the amount of $132,692.08, covering the amount shown by the statement to be due.

Kindest regards.

Yours very truly,

/s/ R. J. Obringer

g—Encs. 2—Registered Mail—R.R.R.

RESPONDENT'S EXHIBIT U

[Admitted in Evidence Dec. 11, 1951]

[Letterhead of Wright and Millikan]

Registered: Return Receipt Requested:

Mr. R. J. Obringer,
Warner Bros. Studios,
Burbank, California

July 25th, 1942

Dear Roy:

I am returning to you herewith check No. 749 of Warner Bros. Pictures, Inc., dated July 10, 1942, payable to Jesse L. Lasky, in amount of $132,-692.08, which you sent me with your letter of July 14th, 1942.

We are unable to accept this check under the present conditions, and for that reason I am compelled to return the same.

With kindest personal regards, I am,

Sincerely yours,

/s/ Loyd Wright

LW/AG—Enc.

RESPONDENT'S EXHIBIT V

[Admitted in Evidence Dec. 11, 1951]

321 West 44th Street, New York City

Circle 6-1000 October 13, 1942

Mr. Loyd Wright
c/o Wright and Millikan
111 West Seventh Street,
Los Angeles, California.

Dear Sir:

In accordance with instruction from Mr. Jesse L. Lasky, we are enclosing herewith statements showing income from distribution of photoplay "Sergeant York" (Domestic and Foreign) to and including August 29th, 1942.

We are also enclosing herewith check, payable to the order of Jesse L. Lasky in the amount of $193,476.70 to cover his share as shown by the enclosed statement to be due.

Yours very truly,

Warner Bros. Pictures, Inc.
T. J. Martin, Auditor

CVRT:M—encl.

Schedule "A" — Warner Bros. Pictures, Inc.

Income from Distribution of Photoplay "Sergeant York" and Jesse L. Lasky's Share Thereof to August 29, 1942

Domestic Income		Income	%	Share Amount
United States Gross Feature and Score rentals to August 29, 1942	$ 4,802,234.12			
Less: Amount on which Jesse L. Lasky does not share	2,580,000.00	$ 2,222,234.12	25%	$555,558.53
Foreign Income:				
Canadian Net Income, after deducting Canadian remittance taxes and discount on Canadian funds on Aug. 29, 1942	113,686.88			
Income from Foreign Countries to August 29, 1942 (per Schedule B)	258,691.71			
Total	$ 372,378.59			
Less: Amount on which Jesse L. Lasky does not share	150,000.00			
		222,378.59	25%	55,594.64
Total Jesse L. Lasky's share to August 29, 1942				$611,153.17

Schedule "A"—(Continued)

Deduct: Lasky's share of cost of advertising campaign (per agreement, dated April 30, 1942	$ 18,988.00	
Amount paid to Public Administrator of the Estate of Tom Skeyhill in connection with the assignment referred to in letter, dated July 31st, 1942 Signed by Jesse L. Lasky and addressed to Warner Bros. Pict. Inc.	239.75	19,237.75
		$591,915.42
Deduct: Total payments to July 10, 1942		398,438.72
Balance		$193,476.70

[Figures in pencil]: $611,153.17
170,000
$786,153.17

(type 10/13/42)
CVRT:M

Schedule "B"

Warner Bros. Pictures, Inc.

Foreign Income from Distribution of Photoplay "Sergeant York" to August 29, 1942

Territory	Gross Billings	Taxes	Quota Losses	Restricted Funds	Net Billings	Net Billings U.S. Funds
Argentine	99,641	2,491.10			97,152.90	$ 22,387.24
Australia	15,969.8.0	718.12.6		11,820.11.1	3,430.4.5	10,970.57
New Zealand	2,397.1.0	379.1.5		819. 9.1	1,198.10.6	3,840.53
Cuba	8,350	275.56			8,071.44	8,072.47
Panama						10,256.25
Trinidad	5,313	194.26		1,665.29	3,453.45	2,875.15
Egypt	2,876,330	46,967		959,749	1,869,611	7,689.35
England	136,899.8.0		2,400.0.0	98,567.11.5	35,931.16.7	144,625.63
India	34,689.0.0	739.13.8		22,675. 3.6	11,273.14.10	3,390.59
Mexico	101,010	5,555.55			95,454.45	19,658.03
Peru	12,560	87.92			12,472.08	1,918.82
Puerto Rico						7,854.14
Uruguay	9,555	28.67			9,526.33	5,004.80
Venezuela-Caracas	15,609				15,609	4,271.34
Venezuela-Curacao	2,255				2,255	1,179.09
Outright Sales						4,697.71
						$258,691.71

(typed 10/12/12) CVRT:M

RESPONDENT'S EXHIBIT W

[Admitted in Evidence Dec. 11, 1951]

[Letterhead of Wright and Millikan]

Registered Return Receipt Requested:

Mr. Roy J. Obringer, October 19, 1942
Warner Bros. Studios,
Burbank, California.

Dear Roy:

I am returning to you herewith check No. 3581 of Producers Settlement Corporation, dated October 16, 1942, payable to Jesse L. Lasky in amount of $193,476.70, which was sent to me under date of October 13, 1942, by Mr. Martin, Auditor of Warner Bros. Pictures, Inc.

We are unable to accept this check under the present conditions, and for that reason I am compelled to return the same.

With kindest personal regards, I am,

Sincerely yours,

/s/ Loyd Wright

LW/AG—Enc.

Respondents Exhibit Z

Warner Bros Pictures, Inc.

Summary of Participants Share of Income From Distribution of Photoplay "Sergeant York"

Jesse L Lasky Participant:	Total to Aug 29/42	October 3d 1942 Increase 8/30/42 to 9/5/42	October 3d 1942 Total To Date	October 31st 1942 Increase 9/6/42 to 10/3/42	October 31st 1942 Total To Date	November 28-1942 Increase 10/4/42 to 11/7/42	November 28-1942 Total To Date	Assigned to United Artists Corporation 12/4/42	Balance at 12/4/42
1 Participants Share of Income:-	78615317	5804029	84419346	5027447	89446793	1438441	81038312 11	(81038312 11)	-0-
2									
3									
4 Less:-									
5 Payments made to or for Account of Producer	21521480	-	21521480	23975	21545455	-	21545455	(21545455)	-0-
6									
7									
8 Net Balance	57093837	5804029	62897866	5003472	67901338	1438441	82285756	(82285756)	-0-
9									
10									

United Artists Corporation: Assignee- Under agreement dated December 4/42:- Between Jesse L Lasky and United Artists Corporation	Amount assigned Per agreement Dec 4/42	Dec 22-1942 Increase 12/5/42 To 12/16/42	Dec 22-1942 Total To Date	
11				
12				
13				
14				
15				
16 Participants Share of Income	81038312 11	(28578)	81035455	Under agreement between W B Pictures United Artists Corp. dated Warner Bros Pict Inc purchased all right, interest and title in and
17				
18 Less:-				
19 Payments made to or for account of Producer	21545455	82000000	81035455	the Share from W Lisk Pic Photoplay "Sergeant York" was made. As $820 was in full payment of all claims of any nature accruing and to
20				accrue in favor of said Jesse L Lasky from distribution of the photoplay
21 Net Balance	82285756	(82285756)	-0-	

THE TAX COURT OF THE U.S.
DIV. 13 DOCKET 26
MARKED FOR IDENTIFICATION
DEC 11
PETITIONER'S EXHIBIT 3
RESPONDENT'S

THE TAX COURT OF THE U.S.
DIV. 13 DOCKET
DEC 11
PETITIONER'S EXHIBIT
RESPONDENT'S

Respondents Exhibit Z

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Warner Bros Pictures, Inc.

Summary of Participants Share of Income From Distribution of Photoplay "Sergeant York"

Party Participant	Totals to Aug 29/42	October 3rd 1942 Increase	October 3rd 1942 Totals To Date	October 31st 1942 Increase	October 31st 1942 Totals To Date	November 28-1942 Increase	November 28-1942 Totals To Date	Assigned to United Artist Corporation 12/4/42	Balance at 12/4/42
Artists Share Income	78615317	58040	29844193	46	50274478	94467	93	14384418	103831211 (103831211)	-0-
Amounts Made To or For Account of Producer	21521480	-	21521480		23975	21545455	-	21545455	(21545455)	-0-
Balance	57093837	58040	29822672	46	50250503	72921338	14384418	82285756	(82285756)	-0-

Artists Corporation: Agreement Under Agreement Dated December 4/42 between Jesse L Lasky and United Artists Corporation

	Amounts assigned Per agreement Dec 4/42	Dec 22-1942 Increase	Dec 22-1942 Totals To Date
Participants Share of Income	103831211	(285756)	103545455
Amounts Made To or For Account of Producer	21545455	8200000	103545455
Balances	82285756	(82285756)	-0-

Under agreement between W B P Inc United Artists Corp. dated 7/22/42 Warner Bros Pict Inc purchased all right, interest and title in and to the Picture "Sergeant York" was made. The $820000.00 was in full payment of any claims of every nature arising out of the furnishing of the story or used in any way connected with the picture.

THE TAX COURT OF THE U.S.
DIV. 13 DOCKET 26376
DENIED FOR INCORPORATION
DEC 11 1951
PETITIONER'S EXHIBIT 3
RESPONDENT'S

THE TAX COURT OF THE U.S.
DIV. 13 DOCKET 26376
DEC 11 1951
PETITIONER'S EXHIBIT 3
RESPONDENT

Warner Bros Pictures, Inc.

Income From Distribution of Production "Sergeant York" And Jesse L. Lasky's Share Thereof

	Totals to Aug 29/42	October 3rd 1942 Increase 9/26/42 to 9/3/42	October 3rd 1942 Totals To Date	October 31-1942 Increase 10/3/42 to 9/26/42	October 31-1942 Totals To Date	November 28-1942 Increase 10/31/42 to 9/26/42	November 28-1942 Totals To Date	December 4-1942 Adjustment Decrease	December 4-1942 Totals as adjusted
Domestic Income:									
United States of America:									
Gross Feature & Score Rentals	11802234.72	2279021.45	14081256.17	1285694.95	15366951.12	868443.45	16235394.57		
Foreign Income:									
Dominion of Canada:									
Gross Feature & Score Rentals	1403548	52580.5	1456122.3	31214.9	1487337.2	21518.4	1508855.6		
Less: Can. Remittance Taxes	140354.3%	5258.1	145612.4 10%	3121.5	148733.9 10%	2151.8	150885.7		
Net (Before Exchange Discount)	1263187.5	47322.4	1310509.9	28093.4	1338602.3	19366.6	1357969.0		
Less: Disc. on Canadian Funds	126318.7 10%	4732.2	131050.9 10%	2809.3	133860.2 10%	1936.7	135796.9		
Net (After Taxes & Exchange Disc.)	1136868.8	42590.2	1179459.0	25284.1	1204743.1	17429.9	1222173.0		
Foreign Countries:									
Net Amounts of Earnings Remitted (Per Statement Remitted):	2586917.1	-	2586917.1	-	2586917.1	55678936.8	58265853.9		
Total Canadian & Foreign:	3723785.9	42590.2	3766376.1	25284.1	3791660.2	55696366.7	59488026.9		
Total Net Income (Domestic & Foreign):	51746127.1	2321611.6	54067738.7	1310979.0	55378717.7	1244946.7	56623664.4		

Computations of Participants Share:

	Net Income Participants Basis								
Domestic:									
Rentals to $2,580,000.00	25800000.00	1750000.00	25800000	1750000.00	25800000.00	1750000.00	25800000.00	1750000.00	
25% 22222341.2 In Excess of $2,580,000.00	25% 22222341.2	5585324.50	13626	1263406.78	7870575	756946.76	43266550.09	6693875.2	
Totals	48022341.2	7335324.50	13626	1263406.78	7870575	756946.76	43266550.09	8443875.2	
Foreign:									
Net Rentals to $150,000.00	1500000.00	-	1500000.00	-	1500000.00	-	1500000.00	-	
Net Rentals in Excess of $150,000.00 25%	22237859	5559464	2266376.1	56594.0	2291660.2	747915.0	3039575.2	1969245.9	
Totals	37237859	5559464	3766376.1	56594.0	3791660.2	747915.0	4539575.2	1969245.9	
Total Jesse L. Lasky's Share:	5174612.71	786153.17	5960765.88	77387.84	6038153.72	49346.79	6087500.51	277556.1	5809944.41

RESPONDENTS EXHIBIT Z

Warner Bros Pictures, Inc.

Supplemental Statement For The Account of Jesse L. Lasky
Showing Distribution of Deduction Payments Made

229 - 2401-000-0001

	Vouchers						Vouchers	Checks		
	Date and Ck No.	Schedule Date	No.	Payee	Amount of Payment		Date and Number	Date	Number	Payee
1	6/30/42 38440	Dec 17 1942	W.B. 613	Jesse L. Lasky	21216.80					
2	6/30/42 CM-02855	—	—	Jesse L. Lasky	175000.00					
3	6/30/42 40665	May 6 1942	W.B. 730	Jesse L. Lasky	(1) 244529.54					
4	7/1/42 41619	July 10 1942	W.B. 749	Jesse L. Lasky	(1) 132692.08					
5	7/2/42 J-12875	Deferred	May - per agreement	4/20/42	1828.00					
6	7/1/42 02874	Oct 16 1942	P.S. 581	Jesse L. Lasky	(1) 193476.70					
7	7/1/42 41841	Legal Cost	See explanation	Kaplan, Solomon & Kutler & McClennen	339.75					
8	7/30/42 40665	May 6 1942	W.B. 730	Jesse L. Lasky	244529.54					
9	7/1/42 41619	July 10 1942	W.B. 749	- -	132692.08					
10	7/2/42 02874	Oct 16 1942	P.S. 581	- -	193476.70					
11					215816.55					
12										
13										
14				United Artist Corporation - Assignee						
15	1942	1942		Under Agreement Between J.L. Lasky & United Artist dated 4/4/42						
16	6/30/42 43797	Dec 22 1942	W.B. 204	United Artists Corp	520000.00					Partial payment per agreement between W.B. Inc. & United Artists Corp. dated 4/4/42
17										
18	Grand Total:				1035816.55					
19										
20					18743.45					
21					239.75					
22										
23										
24										
25										
26										
27										
28										
29										
30										
31										
32										
33										
34										
35										

Respondents Exhibit Z

Warner Bros Pictures, Inc

Income From Distribution of Production "Sergeant York" & Participants Share Thereof

Jesse L Lasky

Domestic And Foreign Income

	August-1-1942		August-29/42	
	Increase 7/4/42 to 8/1/42	Totals To Date	Increase 8/1/42 To 8/29/42	Totals To Date
	30177653	45024544	29978868	48022342
	792898	13531580	503838	14035418
10%	79290	1353159	50384	1403543
	713608	12178421	453454	12631875
10%	71361	1217842	45345	1263187
	642247	10960579	408109	11368688
	—	Per Statement Dated May 30/42	Per Statement Dated Aug-29-1942	
	—			
	—	153147795	10554376	25869171
	—	262753774	10962485	37237859
30%	19900476	51991840	9413625	17461271

Computation of Participants Share

Net Income	Participants Share		
258000000	17500000	258000000	17500000
192244544	48061136	22222341	2555585 3 ✓
45024544	6556136	4802234	12 7305585 3
15000000	—	15000000	— 0 —
11275374	2818843	2223785	9 555946 4 ✓
26275274	2818843	3723785	9 555946 4
4765199	1868379	9617461	271 7861538 7

Warner Bros Pictures, Inc.

Income From Distribution of Production "Sergeant York" to Participants Thereof

Jesse L. Lasky

	Percentage Participation	February 1941 Inception to Date		December 8 - 1941 Inception to Date		January 1 - 1942 Increase 3/31/42	January 1 - 1942 Total To Date	January 1 - 1942 Increase 5/31/42	January 1 - 1942 Total To Date	July 1 - 1942 Quarter Ended 9/30/42	July 1 - 1942 Total To Date
		Increase for the 6 mos Ended 6/28/42	Total To Date	Increase 2/28/42 to 4/4/42	Total To Date	Increase 4/4/42 to 5/31/42	Total To Date	Increase 5/31/42 to 7/4/42	Total To Date		
Domestic Income:											
Gross Feature & Score Rentals											
U.S.A. - Alaska & Hawaii		37589785	37589785	2753277	14034306	28 11584052	4150146	80 41062944	19120974	9459174	00668991
Foreign Income:											
Dominion of Canada:											
Gross Feature & Score Rentals		6990811	6990811	2275573	9266384	1412745	10679129	1097316	11776445	962237	12738682
Less: Can. Remittance Taxes	10%	699081	699081	227557	926638	141275	1067913	109732	1177695	96224	1273869
Net (Before Exchange Discount)		6291730	6291730	2048016	8339746	1271470	9611216	987584	10598800	866013	11464813
Less: Can. Exchange Discount	10%	629173	629173	204802	833975	127147	961122	98758	1059880	86601	1146491
Net (Must Remit)		5662557	5662557	1843214	7505771	1144323	8650094	888826	9538920	779412	10318322
Foreign Countries:											
Gross Film Rentals		5136623	5136623	1096661	8 16103241	x 7532148	8571093	—	— Per	—	Per
Less:									Statement		Statement
Proportionate Share Film Losses		1000000	1000000	—	1000000	x 990222	9778	—	— dated	-	Dated
Foreign Taxes		—	—	—	—			—	May 30/42	-	May 30/42
Total Deductions		1000000	1000000	-	1000000	x 990222	9778	—	—	-	-
Net Film Rentals		4136623	4136623	1096661	8 15103241	x 6541926	8561315	6753480	15314795	-	15314795
Total Net Canadian & Foreign Rentals		9799180	9799180	12809832	22609012	x 5397603	17211409	7642306	24853715	779412	26633127
Total Net Income (Domestic & Foreign)		38569703	37589785	74034263	42603426	39640 61869499	32260089	11748100	94394689	17253291	94570001

Computation of Participant's Share:

	Percentage Participation	Net Income	Participant's Share	Net Income	Participant's Share	Net Income	Participant's Share	Net Income	Participant's Share	Net Income	Participant's Share
Domestic:											
Gross Rentals to $2,580,000	25%	25800000	1750000	25800000	1750000	25800000	1750000	25800000	1750000	26800000	1750000
Gross Rentals in Excess of $2,580,000	25%	1178978	57294464	1454306	28 3635765	7 1570146	80 3925367	16112097	74 45780243	16206689	91 40516723
Total		37589785	74694464	14034306	28 5385765	7 4150146	80 5675367	41912097	74 57780243	42006689	91 58016723
Foreign:											
Net Rentals to $150,000	-0-	9799180	-0-	15000000	-	15000000	-	15000000	-0-	15000000	-0-
Net Rentals in Excess of $150,000	25%	-0-	-0-	7609012	19022253	2211409	5528552	9853715	24634329	10633127	26582282
Total		9799180	-0-	22609012	19022253	17211409	5528552	24853715	24634329	25633127	26582282
Grand Total:		38569703	74694464	74260396	40 5577599	10 43226089	5730652	24 44394689	60243677	29457000	18 60175005

x Denotes Red Figures

RESPONDENT'S EXHIBIT AA

[Admitted in Evidence Dec. 11, 1951]

CONTRACT OF SALE

United Artists Corporation, a Delaware corporation, hereinafter called the "Seller", is desirous of selling, granting and transferring certain property, and Warner Bros. Pictures, Inc., a New York corporation, hereinafter called the "Purchaser," is desirous of acquiring such property.

In order to effectuate the sale and transfer of said property the Seller and Purchaser agree as follows:

(1) Seller warrants that it has entered into a contract under date of the 4th day of December, 1942 with Jesse L. Lasky, and that said contract is valid and subsisting, and that it has not heretofore sold, granted or transferred any of the rights acquired from Jesse L. Lasky pursuant to said contract, and that it has not suffered any lien, encumbrance or other cloud to be obtained or to arise against said contract rights or the properties purported to be conveyed therein, nor has it transferred any interest therein to any other party.

(2) That annexed hereto and marked Exhibit "A" is a copy of said contract of the 4th day of December, 1942 and that said contract is made a part hereof as if fully incorporated herein.

(3) In consideration of the sum of Eight Hundred Twenty Thousand Dollars ($820,000), lawful money of the United States to it in hand paid by the Purchaser, receipt whereof is hereby acknowledged, Seller hereby grants, sells, transfers, assigns

and sets over unto the Purchaser, its successors and assigns forever all rights of every kind and character acquired by it under the terms of Exhibit "A", the contract of sale dated the 4th day of December, 1942 between Jesse L. Lasky of Los Angeles, California, as Seller, and United Artists Corporation, as Purchaser, in and to the motion picture "Sergeant York", and the story thereof, in and to any scenarios on which it was based or written in connection with the production of the motion picture, in and to all negative and positive prints thereof, in and to any production footage not used in the final release, in and to any contracts it may have any interest in or in connection with the production, distribution and exhibition of the picture, "Sergeant York", in and to any contract and any right thereunder or claims thereunder it may have by virtue of contracts or claims thereunder which Jesse L. Lasky may have had with Warner Bros. Pictures, Inc. or any subsidiary corporation, in and to any sound licenses, music licenses or any other licenses it may have any interest in pertaining to or relating to the production, distribution or exhibition of the motion picture "Sergeant York", in and to any rights that it may have which may have been granted to Jesse L. Lasky by the living Sergeant York, either orally or in writing, and all rights it may have in and to the published book entitled "The Life of Sergeant York", any and all interest it may have in any contract, interest or right of Jesse L. Lasky with any director, star, player, cameraman or other person in whatever capacity con-

nected with or associated with the production of the motion picture "Sergeant York", any and all right, title and interest it may have by virtue of the original contract dated May 15th, 1940 between Jesse L. Lasky and Warner Bros. Pictures, Inc., the agreement supplemental thereto of similar date, and any and all other amendments and supplements thereto including specifically the right to all moneys that are now due or which may become due to Jesse L. Lasky from Warner Bros. Pictures, Inc., thereunder and all rights in and to any property which is the subject matter of such contracts, including all the right, title and interest of Jesse L. Lasky in and to any negative or positives of the motion picture "Sergeant York", and in and to all uses, present and future, that it may have of the stories, the negatives, the positive prints and all rights of every kind and character, in and to any rights which it or Jesse L. Lasky may have to the use of the title "Sergeant York", in and to any and all re-issue or re-make rights which it or Jesse L. Lasky may have in the picture "Sergeant York", or the subject matter thereof, in and to any rights which it or Jesse L. Lasky may have in the distribution or exhibition of "Sergeant York" with substandard width film and any and all rights or interest or property which it or Jesse L. Lasky may have of any kind or character in the motion picture "Sergeant York", or any of the properties used in the production thereof, and any of the rights connected with production, distribution or exhibition thereof, and any and all

claims, manner of action and actions, cause and causes of action, suits, sums of money, accounts, damages and demands of any kind and character Jesse L. Lasky may have against Warner Bros. Pictures, Inc., or which arise out of or in connection with the motion picture "Sergeant York" against Warner Bros. Pictures, Inc.,

(4) Pursuant to the authority granted to Seller in paragraph 4 in its said agreement with Jesse L. Lasky dated December 4th, 1942, Seller does hereby for and in the name of and on behalf of Jesse L. Lasky and his successors and assigns, remise, release and forever discharge Warner Bros. Pictures, Inc. and all of its subsidiary and affiliated corporations of and from all manner of action and actions, cause and causes of action, suits, duties, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims, and demands whatsoever in law or in equity which against Warner Bros. Pictures, Inc. and its subsidiary and affiliated corporations the said Jesse L. Lasky now has or which he or his successors and assigns hereafter can, shall or may have for, upon or by reason of any manner, cause or thing whatsoever from the beginning of the world to the way and date of this agreement relating to or in connection with the motion picture "Sergeant York", the story or stories upon which it is based, and any and all rights which he, and his successors and assigns, may have in and to the receipts from

the distribution and exhibition thereof or any part thereof and does further release and discharge the said Warner Bros. Pictures, Inc. from rendering any reports and accounts to him, from paying any money to him or in anywise be responsible for or have any duties to him by virtue of or arising out of the agreement and supplemental agreement both dated May 15, 1940 between him and Warner Bros. Pictures, Inc. and all supplements or amendments thereto, and he does hereby acknowledge that he does not have nor shall he have any rights or interest of any kind whatsoever in and to the motion picture, "Sergeant York", and Warner Bros. Pictures, Inc. is entitled to license, sell, dispose of, reissue, re-make and in every other way treat the motion picture, "Sergeant York", the negative, positive prints, stories, scenarios and other properties thereof and the entire receipts for the world from the distribution and exhibition thereof as its sole and exclusive property without any accounting, demand or restriction of any kind.

The release given by the Seller in favor of the Purchaser of all claims that the Seller may have against the Purchaser shall apply only to this "Sergeant York" transaction and shall in no wise apply to other transactions between the Seller and Purchaser involving other properties.

(5) The Seller agrees to execute on Purchaser's demand any further documents which the Purchaser may request in order to effectuate the sale and transfer contemplated by these presents.

Signed, sealed and delivered, this 22nd day of December, 1942.

United Artists Corporation,
(Seller)
/s/ By Edward C. Raftery

Warner Bros. Pictures, Inc.
(Purchaser)
/s/ By Stanleigh P. Friedman, Vice Pres.
[Seal] Attest: H. S. Bauford, Asst. Secy.

[Note: Exhibit A is a duplicate of Exhibit 7-B set out at pages 56-61 of this printed record.]

PETITIONER'S EXHIBIT No. 9
[Admitted in Evidence Jan. 21, 1955]

[Letterhead of Warner Bros. Pictures, Inc.]

(Copy) 321 West 44th Street,
New York City, N.Y.
Mr. Jesse L. Lasky, November 24, 1941
Warner Bros. Studio, Burbank, California.

Dear Jesse:

Am sorry I didn't get a chance to see more of you while you were in New York, as I intended to talk to you about the matter which I am now writing you.

In talking with Jack, at the time the deal for Sergeant York was being made with you, he explained that the picture would cost in the neighborhood of a million dollars. Therefore, when the deal

was finished and presented to our Board of Directors for their approval, it was all done with the understanding that the picture would cost as above stated, and the deal was approved by the Board.

Without going into the "why's and wherefore's", the picture went into $1,659,000.

Inasmuch as you are to participate in the income after $1,600,000, it is my duty as treasurer of our Corporation to bring a matter of this kind to the attention of our Board, who will naturally criticize the picture having run into this much money over the amount originally represented it was to be produced for.

As you are to be with us for the balance of your natural life, which I hope will be for many years, I feel, that in all fairness to our company and the representations made by all of us, your participation of the percentage of the gross should start at $2,200,000.

I know after you analyze this, Jesse, you will agree with me that it is only fair and reasonable for you to do this. Our whole organization has concentrated to roll up the largest possible gross we have ever taken in on any individual picture; therefore, when I ask you for your cooperation on this I know that in the long run you will not be the loser.

Would appreciate hearing from you.

Kindest personal regards.

Sincerely yours,

(Signed) Albert Warner.

PETITIONER'S EXHIBIT No. 10
[Admitted in Evidence Jan. 21, 1955]

Major Albert Warner, December 4th, 1941
Warner Bros. Pictures, Inc.
321 West 44th Street, New York City, N.Y.

Dear Abe:

I am in receipt of your letter of November 24th and I am indeed sorry that while I was in New York you did not take advantage of my presence there to discuss the subject matter of your letter. As it is, it will take a somewhat lengthy letter to express my feelings about this situation—so bear with me and read the following.

First, as an old friend, I do not hesitate to disclose my present personal situation to you. You will remember that when I left Paramount in 1932, I lost my entire personal fortune. As a matter of fact, when I arrived in California my affairs were so involved that I retained Loyd Wright, who has been my attorney ever since, and by the time we were through settling with all my creditors, I had not only lost my fortune and my home but I had to borrow considerable sums on my life insurance. Since that time I have cleared myself of all indebtedness, but this effort has left me without any cash reserve whatsoever.

About this time, I conceived the idea of acquiring the picture rights to Sergeant York's life. This cost me six months of negotiation and four trips to Tennessee, during which time I was not drawing salary from any company—a considerable invest-

ment on my part, you must admit. When I finally persuaded York to sell his life story, I had to borrow $25,000 on my life insurance policies in order to make the first payment. I did not hesitate to do this because I knew that I was acquiring one of the most valuable properties available to the picture industry.

When I contacted Harry Warner with the object of producing the picture for your company, I did not attempt to make a profit on the resale of the picture rights which I might justifiably have done. Instead of that, having absolute faith in the timeliness and box-office appeal of this subject, all of which Harry immediately sensed, and my ability to successfully produce it, I determined to gamble, and so was willing to make a deal so that I would not get any profit until after the picture grossed $1,600,000.

Your contention that Jack Warner estimated the picture could be made for approximately $1,000,000 is true. He should not be criticized because of the fact that the picture went over this amount, as many unforeseen elements caused this overage—for instance: we were delayed for several months in starting production waiting to secure the services of Gary Cooper. Let me say, even then it would have been impossible to secure his services if Jack had not very wisely offered Bette Davis in trade for Cooper, which gesture on his part I deeply appreciated. Also, we were producing the picture during the rainy season and lost about three weeks due to extraordinary rainy weather when we had nothing

left to shoot but exteriors—battle scenes, etc. Other unforeseen conditions arose which further increased the cost of the picture. However, this is not a new situation. We who understand the exigencies of picture production realize it is not unusual for occasional big pictures to exceed their budgets by a very large percentage.

During the years I served Paramount as its First Vice President in Charge of Production, we had many instances of pictures exceeding their budgets from $500,000 to as much as $1,000,000. These very pictures, however, proved in the end to be our greatest money-makers—and I was always able to face my Board of Directors courageously because the eventual profit on these pictures that exceeded their budgets justified their enormous additional expenditures.

It seems to me that is the situation that now confronts you. Instead of apologizing or explaining the fact that "Sergeant York" cost approximately $600,000 more than was estimated, you should ask for a vote of thanks and confidence for first, having had the foresight to make the deal with me and, finally, for the amount of profit it will bring to your company even in spite of the percentage that will accrue to me.

Some years ago I faced a similar situation with Cecil deMille. I negotiated a deal with deMille for "The Ten Commandments" in which I had agreed to give him a percentage of the net profit. Messrs. Zukor and Sidney Kent telephoned me that deMille was taking advantage of our close friendship to put

over an unfair deal and that if I would not mind they would send Sidney Kent to attempt to negotiate a better deal with deMille. Kent arrived, and when he was through with his negotiations, he had given deMille a percentage of the gross after a certain figure. Kent did not know what deMille knew —that this great subject, if successful, could pile up a record gross return. The final result brought "The Ten Commandments" in for a cost of over $2,000,000, but the gross reached about $5,000,000, so that deMille's share eventually turned out to be as large or even larger than Paramount's. I was later asked to discuss the deal with Cecil for a possible adjustment but he and his attorney, Neil McCarthy, refused to even consider the matter, and the part I tried to play in these negotiations proved very embarrassing, and they both censured me severely for making them such an unbusinesslike proposition from their point of view. When the result of "The Ten Commandments" was calculated, even though deMille received more as his share than Paramount, it worked out that Paramount's share of the profits were so satisfactory that he was given a new contract at a greater remuneration and was regarded as a hero, and not as a heavy, for many years thereafter.

Where it was hard for Cecil to forgive me for attempting to repudiate my company's contract I, who am made of a different clay, do not blame you for writing to me and requesting a similar adjustment.

If your company were having a very bad year

and if I had any surplus cash with which to protect my family in the event of my death, I would just be generous enough to meet your request; however, as Warner Bros. are having one of the biggest years in their history and your Board of Directors must be jubilant over the shrewdness with which the company has been operated, I don't think that you are going to apologize to your Board for Harry and Jack Warner having made the "Sergeant York" deal—and frankly, by the way, I consider much of the success of the company's operation is due to their mature judgment, showmanship and hard work.

How I would like to have a change to face your Board and justify this deal. I would tell them that, in the first instance, they should have paid at least $150,000 for the "Sergeant York" picture rights alone, which would have reimbursed me for my six months of time and financial outlay in acquiring the story—but I didn't ask for this sum because I was willing to gamble for my profit on the outcome of the picture itself. But why go on—I know you follow my thoughts.

Answering your last paragraph, I agree that your entire organization has concentrated to roll up the largest possible gross you have ever taken in on any individual picture. Your sales organization and your superb publicity and exploitation department did an historic and record-breaking job exploiting and selling this picture. It is true that I will profit considerably by their efforts but so will your company, not alone in their share of the profits from

"Sergeant York" but, more important, because this magnificent effort has inspired and paved the way for future big pictures. The great exploitation and the record terms secured from various theatre circuits on "Sergeant York" can now be approximated, and I dare say will even be surpassed on the future Warner Bros. greater pictures, so that if your company did not make a dollar on "Sergeant York" the precedent established on theatre terms, exploitation, etc., for this picture will cause your company to make many a dollar on future great pictures that you are now turning out.

My dear Abe—I hope, as you said, to be with your great company for the rest of my natural life, or at least as long as its present leaders are at the helm. I don't know that I would want to continue if a man of Jack's courage and foresightedness and showmanship were not at the production helm.

Let me give you an example of what a man of my mature experience can contribute to the future progress of your, or I much prefer to say, our company. On the last trip to New York, I spent days at the Park Avenue headquarters of The Boy Scouts of America. Without it costing our company a dollar, I secured the exclusive rights to produce an epic picture which will include the history and a vivid melodramatic modern Boy Scout story, embracing the whole Boy Scout movement, from its inception during the Boer War, to President Roosevelt's annual broadcast to the Boy Scouts of America on next February 8th, 1942. This picture can be a monument for the Warner Bros.—the greatest

contribution the motion picture industry could ever make to the cause of Democracy and service to the public. It can pile up the largest gross in the history of the industry, with the possible exception of "Gone with the Wind"—and even that picture can be rivalled if we have the foresight and courage to take full advantage of our opportunity in first producing the kind of picture the subject matter affords and then in distributing it to again take full advantage of the extraordinary public reception that awaits it—and, finally, to book it and exploit it courageously, knowing that we have the greatest potential subject of all time.

Now here is the point: if I were not working for Warner Bros., I would sell my Boy Scout story to a major studio for nothing less than $150,000, and I would get a percentage of the gross of the picture as well, even if I had to go to the length of financing independently the cost of production. I happen to know that in one week's time I could secure financial backing from a dozen public-spirited business men throughout the nation, all of them connected with the Boy Scout movement for many years, who would get behind this picture, not alone as a patriotic gesture but as a sound investment.

Kindly study my present contract and learn what I am going to get for this—which for me will be a herculean task. Not one cent of percentage or profit of any kind will accrue to me. I will only receive a salary considerably less than is paid to a score of other producers who start by paying record-breaking sums for great novels and plays—and your in-

vestment to secure the exclusive rights to make the Boy Scout picture is the cost of my trip to New York. At this time I should ask you for an adjustment of my new contract so that if I am successful in carrying out this dream of a great profit-maker in the Boy Scout picture, I should share in its profits—but a deal is a deal.

Please read the attached copy of my speech which I recently delivered extemporaneously at a vast meeting of Boy Scout executives from all over the United States at their annual meeting in New York City at the Hotel Astor. The goodwill which I created at this meeting for Warner Bros. and Jesse Lasky, which is spreading and growing throughout the nation, will be worth more to the company than all the percentage you are going to pay me on account of "Sergeant York".

Forgive this long letter but I wanted to take advantage of your letter to give you a broad picture of my ambitions for your company; of my loyalty towards it—and I wanted to present the subject so that it would be so clearly seen by both sides that, after you have read this letter, there will not be any hard feelings but, quite to the contrary, our relations will be further cemented for a long and, I hope, glorious period of years.

I can't help but smile as I conclude this letter because I am thinking back to the many times I was compelled to do the very thing, under similar circumstances, that you are attempting to do in order to placate your Board of Directors and serve the best interests of your company.

Please have no regrets over having written me as you did—and please do not blame me for turning down your request that I give up $120,000 soon to accrue to me. I am very glad that this matter came up because I feel it will create a better understanding between us—and, anyway, it is well that matters of this kind are brought out in the open for frank and honest discussion.

With kindness personal regards, I am

Sincerely yours,

Jesse L. Lasky

P.S. I would appreciate it enormously if you would pay me the compliment of reading this honest expression of my thoughts and experiences to your Board of Directors.

[Endorsed]: No. 14868. United States Court of Appeals for the Ninth Circuit. Bessie Lasky and Jesse L. Lasky, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petitions to Review Decisions of The Tax Court of the United States.

Filed: September 6, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14868

BESSIE LASKY, JESSIE L. LASKY,

Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

ORDER TO CONSOLIDATE

It appearing to the Court, upon the motion of the Petitioners on Review in the above-entitled causes, who have filed petitions for review of the decisions of the Tax Court of the United States, that the said causes were decided upon the basis of one record and one findings of fact and opinion, and that both cases involve identical questions of law and fact.

It is ordered that the above-entitled causes be, and they are hereby, consolidated for the preparation of the record on review and for hearing and disposition by this Court, and

It is further ordered that the Clerk of this Court transmit a certified copy of this order to the Clerk of the Tax Court of the United States, to be by him incorporated in the transcript of record on review herein.

Dated: August 19, 1955.

/s/ WILLIAM DENMAN,
Chief Judge, Ninth Circuit
/s/ H. T. BONE,
/s/ WM. E. ORR,
Judges, U. S. Court of Appeals for Ninth Circuit

[Endorsed]: Filed August 25, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Causes.]

STATEMENT OF POINTS

The points on which petitioners intend to rely on this appeal from the opinion and final order and decision entered by the Tax Court of the United States are:

1. The Tax Court of the United States erred in holding and deciding that the proceeds from the sale by petitioner Jesse L. Lasky of his rights under contracts of May 15, 1940, with Warner Bros., to United Artists Corporation, for $805,000, were taxable as ordinary income instead of at capital gains rates.

2. The Tax Court erred in failing to hold that the proceeds from the sale by petitioner Jesse L. Lasky of his rights under contracts of May 15, 1940, with Warner Bros., to United Artists Corporation were taxable as the sale of a capital asset.

3. The Tax Court erred in failing to hold that the agreement of May 15, 1940, and the supplemental agreement of May 15, 1940, by which petitioner Jesse L. Lasky sold to Warner Bros. all his rights to the "Sergeant York" story and Warner Bros. agreed to pay petitioner a part of the gross receipts in varying percentages from the distribution of the photoplay, are entirely separate and distinct from the employment contract between petitioner Jesse L. Lasky and Warner Bros. dated May 8, 1940.

4. The Tax Court erred in holding that petitioner Jesse L. Lasky received royalties under his contracts of May 15, 1940, with Warner Bros.

5. The Tax Court erred in holding that petitioner's right to a share in the proceeds of the motion picture "Sergeant York" was due to his contribution as a producer.

6. The Tax Court erred in holding that the evidence failed to show that a bona fide dispute existed in 1942 between petitioner Jesse L. Lasky and Warner Bros.

7. The Tax Court erred in holding that the sale by petitioner Jesse L. Lasky, on December 4, 1942, to United Artists Corporation was not a bona fide sale to a third party with no understanding that United Artists Corporation would resell to Warner Bros.

8. The Tax Court erred in holding that United Artists Corporation was a mere intermediary in the transaction whereby petitioner Jesse L. Lasky

sold his rights under the contracts of May 15, 1940, with Warner Bros. to United Artists Corporation.

9. The Tax Court erred in holding that there was no business purpose behind petitioner's sale to United Artists Corporation on December 4, 1942.

10. The Tax Court erred in determining that petitioner Jesse L. Lasky preferred to have his share of the proceeds from the picture "Sergeant York" accrue and accumulate in the hands of Warner Bros.

11. The Tax Court of the United States erred in holding on rehearing that: "It is concluded that Lasky sold his accrued earnings in the picture Sergeant York, which amounted to $822,857.56, to United Artists at a 'discount' of over $17,000, and that United Artists collected from Warner Brothers, Lasky's share of the accrued earnings to the extent of $820,000, thereby bringing about Warner Brothers' acquistion of the 25 per cent interest of Lasky for no more than the accrued earnings of the 25 per cent interest."

12. The Tax Court of the United States erred in holding and deciding after the rehearing and reconsideration that the proceeds from the sale by petitioner Jesse L. Lasky of his rights under contracts of May 15, 1940, with Warner Bros. to United Artists Corporation, for $805,000, were taxable as ordinary income instead of at capital gains rates.

13. The Tax Court erred in holding and deciding that petitioner Bessie Lasky owed a deficiency in

income tax for the year 1944 in the amount of $224,722.55.

14. The Tax Court erred in holding and deciding that petitioner Jesse L. Lasky owed a deficiency in income tax for the year 1944 in the amount of $224,515.14.

15. The Tax Court's opinion and decisions are not supported by the evidence.

16. The Tax Court's opinion and decisions are contrary to law.

September 7, 1955.

Respectfully submitted,

/s/ ROBERT ASH,
Attorney for Petitioners on Review

Acknowledgment of Service attached.

[Endorsed]: Filed September 8, 1955. Paul P. O'Brien, Clerk.

[fol. 460] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14868

BESSIE LASKY AND JESSE L. LASKY, Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Petitions for Review of the Decisions of the Tax Court of the United States

RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION —Filed March 23, 1956

Comes now the respondent, Commissioner of Internal Revenue, and moves this Court to dismiss the petitions for review filed herein for lack of jurisdiction. As grounds for this motion respondent states taxpayers' petitions for review were not filed within three months after the decisions of the Tax Court were rendered as required by Section 1142 of the Internal Revenue Code of 1939, and Section 7483 of the Internal Revenue Code of 1954. Decisions in the case of each taxpayer respectively were rendered by the Tax Court on April 8, 1954. (R. 92-03.) Petitions for review by this Court were not filed until August 10, 1955. (R. 6, 145-149.)

The facts, which are not in dispute, stated in support of this motion are as follows:

On April 8, 1954, the Tax Court promulgated its findings of fact and opinion in the above-entitled consolidated [fol. 461] cases (R. 62-92) after hearing had before Judge Harron on December 10 and 11, 1951, and the subsequent filing of briefs by both sides (R. 2-3).

The opinion concluded with the following words (R. 92): "Decisions will be entered for the respondent." On April 8, 1954, the Tax Court rendered its decision in the case of each of the taxpayers, deciding in the case of taxpayer Bessie Lasky that there is a deficiency in income tax for the year 1943 in the amount of $224,722.55, and in the case

of taxpayer Jesse L. Lasky that there is a deficiency in income tax due for the year 1943 in the amount of $225,515.14. (R. 92-93.) A copy of each of these decisions was, as appears below, served by the Clerk of the Tax Court on April 9, 1954, by registered mail on Mr. Herschel B. Green, the first attorney of record for the taxpayers in the Tax Court proceeding. (R. 92-93.)

No petition for review of these decisions in the Court of Appeals was served within three months after April 8, 1954, the date the decisions were rendered.

Up to this point taxpayers had been represented in the Tax Court by Messrs. Herschel B. Green and Loyd Wright of Wright, Wright, Green and Wright, and Mr. Harrison Harkins. (R. 62.) However, on or about August 24, 1954, after expiration of the three months' period following the rendering of the decisions by the Tax Court, the present attorney for taxpayers filed with the Tax Court a motion for leave to file a motion to vacate its decision here out of time. (R. 93-94.) This motion was granted and taxpayers moved to vacate the decisions entered in these cases on April 8, 1954, by a motion lodged on August 24, 1954. (R. 94.) On September 10, 1954, taxpayers filed four affidavits in support of this motion to vacate the decisions of April 8, [fol. 462] 1954, made respectively by taxpayer Jesse L. Lasky, his secretary, Randolph Rogers, and his attorneys Herschel B. Green and Harrison Harkins, each dated September 7, 1954. (R. 95). The facts stated in these affidavits are in substantial agreement and from them the following appears:

Mr. Herschel B. Green was one of the attorneys of record for taxpayers in the Tax Court, connected with the firm of Wright, Wright, Green and Wright with offices at 111 West 7th Street, Los Angeles, California. (R. 101.) Shortly after April 8, 1954, there were received at these offices the findings of fact and opinion of the Tax Court in these cases and shortly after the receipt of the opinions and on April 14, 1954, there was held a conference at these offices attended by taxpayer Jesse Lasky, his secretary, Mr. Rogers, and his attorneys, Mr. Harkins, Judge Milliken, Mr. Loyd Wright and Mr. Green. (R. 95, 101.) At this conference the findings of fact and opinion of the Tax Court were discussed as well as what future action should be taken, in-

cluding such matters as the possibility of appeal or compromise. (R. 95-96, 99, 101-102, 103-104.) During the course of this conference Mr. Lasky was told that the decisions of the Tax Court in these cases would be received separately from the findings and opinion and he would have three months after the date the decisions were entered within which to appeal. (R. 96, 99, 102, 104.) Mr. Green promised to notify Mr. Lasky immediately upon receipt of the decisions. (R. 102.)

What occurred subsequently is stated in Mr. Green's affidavit as follows (R. 102-103):

> Thereafter, Affiant talked with Mr. Lasky, or his secretary, on two or three occasions, when Affiant was [fol. 463] asked if the Decisions had been received, and Affiant informed him on each occasion that they had not. During one or two telephone conversations with Mr. Harkins, we made mention of the fact that the Decisions had not been received and that Affiant was keeping a constant lookout for the receipt [sic] of these Decisions, having in mind the ninety-day appeal period above referred to.
>
> On or about July 26, 1954, Mr. Harkins informed Affiant that he had received word from the desk of the Tax Clerk that the Decisions had been entered in the two cases on April 8, 1954, and that copies thereof had been mailed to us. Affiant thereupon made an immediate search of the Lasky files in his office, and at that time and for the first time discovered copies of the two Decisions. They were on letter-size paper and had been permanently placed in one of the Lasky files on the correspondence side of the file rather than the legal side. Affiant thereupon, on that same day, telephoned Mr. Lasky and informed him that in going through his files Affiant had found the two Decision[s] and *they* they [sic] were dated April 8, 1954.

Mr. Green also wrote Mr. Lasky under date of August 5, 1954, as follows (R. 98):

> Agreeable to your telephone request, there are enclosed the decisions of The Tax Court in Mrs. Lasky's and your tax cases.

> You will note that these decisions are dated April 8, 1954. They did not come to my attention until I discovered them in going through the file last week. They came in separately from the two opinions and were [fol. 464] apparently here in the office at the time when we held the conferences with Judge Milliken, Mr. Harkins and others to discuss the contents of the Court's opinion.
>
> I had been on the look-out for these decisions from the inception due to our discussions relative to an offer in compromise.

Mr. Harkins, who was also one of the attorneys of record, stated that under date of July 20, 1954, he wrote the Clerk of the Tax Court and inquired about the status of the proceedings and (R. 105)—

> That on July 26, 1954, your affiant received a letter from the Clerk of the Court, dated July 23, 1954, informing him that the decisions had been entered and had been served April 9, 1954, upon the first counsel of record in the proceedings, Herschel B. Green, Esq., 111 West Seventh Street, Los Angeles 14, California;
>
> That on July 26, 1954, your affiant informed Mr. Green of the communication from the Clerk of the Court; and Mr. Green on the same date informed your affiant that copies of the decisions had been found in the files of his office;
>
> That on July 26, 1954, Jesse L. Lasky informed your affiant that Mr. Green had that day told him that copies of the decisions had been served on Mr. Green.

Taxpayers' motion to vacate the decisions was heard by Judge Harron on September 14 and 16, 1954 (R. 106-133), where taxpayers were represented by their present counsel, who, as aforesaid, had not had any prior association with the case (R. 115). From the statement of the court [fol. 465] and counsel the following additional facts appear:

The court stated (R. 114):

> Now, the records of the Tax Court show that the decisions in Docket Nos. 26396 and 26397 were sent by registered mail and, as I understand from Mr. Ash's

> statement, the Petitioners here do not deny that copies of the order of this Court, which is called a decision, were received in the office of Mr. Herschel B. Green in Los Angeles under registered mail. The decisions were mailed to Mr. Green's office because he was the attorney who first entered his appearance.

Further it appeared without dispute that there was no record in the Tax Court of the receipt of any letter of inquiry prior to Mr. Harkins' letter to the Clerk dated July 20, 1954 (R. 114-116), and that the three months had expired on or about July 8, 1954 (R. 116). Judge Harron stated that she had never received any letter of inquiry from counsel. (R. 116, 126-127.) The court pointed out that the findings and opinion indicated that the decision either was not to be entered here under Tax Court Rule 50, which would have required a computation, but was expressly stated to be entered for the respondent (R. 116-117) and in this connection the court observed (R. 119):

> So the question must come up as to why no inquiry was made until July 20 about the decision since the legend under the findings of fact and opinion said, "Decision will be entered for the Respondent." There was no Rule 50 computation to be made. The order of decision was entered immediately upon the "filing" [fol. 466] officially of that findings of fact and opinion.

At the adjourned hearing on September 16, 1954, there transpired the following colloquy between court and counsel here pertinent. The court inquired (R. 126-128):

> I wonder, Mr. Ash, if any explanation has been given to you about why Mr. Harkins, for example, waited so long to ask Mr. Mersch [Clerk of the Tax Court] about the entry of the decisions. As you all know, decisions to be entered for Petitioner and Respondent, even if you had a complicated order to write, would not take more than a half hour to have drafted, typed, and signed. It is very easy to find out from the Clerk whether the judge is on the job or is sick, or is in Washington or away on a Calendar, and what I cannot understand is what Mr. Harkins, who tried this case, was thinking of.

What did he think I was doing? Why did he think it would take me three months to have prepared and signed an order which takes not more than a half hour to get done?

I have looked in the file to see if there was a motion for reconsideration filed or if there was any motion pending that would give Mr. Harkins or any of the counsel ground for thinking that while a motion for reconsideration was being considered a decision would not be entered or something. Have you any explanation?

Mr. Ash: The only explanation I have is—first of all, I will preface it by saying that any of us who do tax work would certainly take the position that Your Honor is taking, because you recognize that the decision would [fol. 467] be simultaneous practically with the findings of fact and opinion except in some unusual situations like you mentioned. The only possible explanation is that, of course, Harkins did repeatedly ask Mr. Green if the decisions had come down and was assured that they had not.

As I understand it, for some reasons the Tax Court sent copies of the findings of fact and opinion to each of the counsel of record but, of course, following the the established practice that we all know, the decisions went only to Mr. Green.

The Court: That still does not give me an answer to the question.

Mr. Ash: I do not know the answer.

The Court: Mr. Harkins could call Mr. Green 20 times and Mr. Green could say "We haven't received a copy of the decision." What would Mr. Harkins think I was doing at this end of the rope?

Mr. Ash: If I were in their position, I would make some inquiry after maybe a week or two to find out if the decisions had been entered.

The Court: I must say that while we all observe the formalities—we must observe the judicial position, otherwise we are always available to counsel to answer their questions and consider their problems. I cannot locate in the record motions that might have been con-

sidered as a reason for delaying the entering of the decisions.

Mr. Ash: I cannot understand it and I was astonished as could be when I first heard of this thing, which was just shortly before Mr. Heubusch of our office came down and looked through the file and said there is not [fol. 468] a thing in the file since the entry of decisions, no motions or anything, and we just could not believe that that could happen, but it did.

The Court: The Calendar Section tells me that the decisons went by registered mail April 9. I guess they went by ordinary mail, not airmail, so it probably reached Los Angeles a week later.

The Commissioner, though regretting that the situation had arisen, made clear through his counsel his objection to the granting of the motion to vacate on the ground that the Tax Court was without jurisdiction in the premises (R. 112-113) and filed a memorandum of authorities in support of his position (R. 121-122). In response to inquiry by the court, counsel for the Commissioner stated that since the Tax Court was without jurisdiction, his opposition to the motion was based both upon the law and as a matter of policy (R. 129):

The Court: * * *

As I understand it, Respondent does not object to the granting of the motion made to vacate the decisions, but takes the position that the Tax Court is powerless to act, isn't that it? Are you taking the lawful position?

Mr. Ray: No, unfortunately, Your Honor, we do object. Not only do we object on the ground that the Tax Court has no jurisdiction, but we do object because as a matter of policy where the Tax Court has no jurisdiction we cannot become a party to or have any part of granting a motion in circumstances where the Tax Court has no jurisdiction.

[fol. 469] At these hearings of September 14 and 16, 1954, on the motion to vacate, notwithstanding that the matter was open for full discussion and fully discussed from all angles (R. 106-133), no suggestion was made on taxpayers' behalf that a rehearing was requisite for the purpose of

offering additional evidence on the merits. Substantially the only matters brought up were what had in fact occurred in the instant case and the extent of the Tax Court's power to extend the time for filing a petition to review in relief of mistake and inadvertence.

Nevertheless, subsequently on or about October 11, 1954, taxpayers moved for leave to file an amendment to the motion to vacate the decisions out of time, which was granted. (R. 133-134.) This amendment to the pending motion to vacate the decisions reads as follows (R. 134):

> "Come now the above-named petitioners by their attorney, Robert Ash, and move the Court vacate the decisions entered herein on April 8, 1954, *for the purpose of granting petitioners a rehearing of the case on its merits.*
>
> "The statement of facts and supporting affidavits in support of this motion are incorporated herein by reference." [Italics supplied.]

The statement of facts, which taxpayers filed in support of their amended motion on October 11, 1954 (R. 4), suggests that the court should exercise its discretion and grant the motion to vacate the decisions and order a rehearing for reasons which are itemized under six headings. The first four may be summarized as follows:

[fol. 470] 1. The findings of fact and opinion of the Tax Court were promulgated April 8, 1954.

2. Decisions were entered for respondent on April 8, 1954.

3. The fact that the decisions were entered did not come to the attention of taxpayers until more than three months had elapsed.

4. Copies of the decisions which were mailed to their counsel did not actually come to counsel's attention upon their receipt as they were inadvertently misfiled. Consequently counsel advised taxpayers and others making inquiry on their behalf that the decisions had not been received and this advice was given to taxpayers by their counsel through mistake of fact.

The statement then continues (Appendix B, *infra*):*

(5) Because petitioners had no knowledge that the decisions had been entered on April 8, 1954, and because their counesl advised them affirmatively upon inquiry that the decisions had not been entered, through no fault or negligence of the petitioners they did not file this motion to vacate the decisions within the time allowed by Rule 19 (e) of the rules of this Court.

(6) In view of the foregoing, good cause exists which justifies the Court in vacating the decisions heretofore entered on April 8, 1954, for the purpose of granting petitioner a rehearing of the case on its merits. At a rehearing of the case the petitioner would present additional evidence which will show that [fol. 471] the opinion and decision of the Court is wrong on its merits. The evidence would show:

(a) That the agreement of May 15, 1940, and the supplemental agreement of May 15, 1940, by which the petitioner sold to Warner Brothers all his right to the Sergeant York Story and Warner Brothers agreed to pay petitioner a part of the gross receipts in varying percentages from the distribution of the photoplay are entirely separate and distinct from the employment contract between petitioner and Warner Brothers dated May 8, 1940.

(b) The evidence would show in detail that a bona fide dispute existed in 1942 between petitioner and Warner Brothers. Additional witnesses would be produced to establish this important fact.

(c) Evidence would be produced to show that the sale by petitioners on December 4, 1942, to United Artists Corporation was a bona fide sale to a third party with no understanding that United Artists Corporation would resell to Warner Brothers. This evidence would show conclusively that United Artists

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* The original of this "Statement of Facts," which, though designated as part of the record and for printing, the Tax Court Clerk inadvertently omitted, has now been certified and transmitted and is printed as Appendix B, *infra*.

Corporation was not a mere intermediary in the transaction.

(d) The evidence would show in detail the business purpose behind petitioner's sale to United Artists Corporation on December 4, 1942.

(e) Upon receipt of this additional evidence at a rehearing it is petitioner's opinion that the Court will revise its opinion in accordance with the newly-presented facts and hold that the sale by the peti- [fol. 472] tioners of their property rights to United Artists Corporation on December 4, 1942, was a bona fide sale of a capital asset within the provisions of Section 117 of the Internal Revenue Code and that the transaction had been properly reported in their 1942 Federal Income Tax Return. Consequently, the decisions on the rehearing would be that there was no deficiency in tax due from the petitioners for the taxable year 1943.

Thereafter, without any further proceedings, by order dated December 13, 1954, the Tax Court granted taxpayers' amended motion and ordered (R. 135)—

> That the decision in each proceeding which was entered on April 8, 1954, be vacated and set aside for the purpose of granting petitioners a further hearing on the merits.

This order of December 13, 1954, recited that it was based on cause shown in the amended motion, lodged October 11, 1954, and in the statement of facts in support thereof (summarized and quoted immediately above).

The Acting Chief Counsel, Internal Revenue Service, thereupon moved to vacate this order of December 13, 1954, on the ground that the Tax Court's decision had become final and the court was without power to grant taxpayers' motion. (R. 136-137.) This motion was denied, as was also a motion for review by the entire Tax Court of the order vacating the decisions. (R. 137.)

Pursuant to the order of December 13, 1954, the Tax Court held a further hearing (January 21, 1955, continued [fol. 473] January 26, 1955). (R. 300-385.) This hearing was exclusively on the merits. Additional testimony was

taken of taxpayer Jesse L. Lasky and of three additional witnesses. At the conclusion of the testimony Judge Harron outlined in detail the Tax Court's practice with respect to the entering of its decisions (R. 375-380), proposing an improvement and at the end stating (R. 380-381):

> I think it is apparent to you why I can't put this in an opinion. If I did, the opinion would probably have to be reviewed by the whole court, but I think that in this case, for the purposes of an Appellate Court, this explanation might be helpful because it's very hard to find out what our procedure is like.

The court then said (R. 382-383):

> We have had briefs in this case. I really don't see the need for the filing of supplemental briefs. You have asked the court to give the matter further consideration of the question that was originally presented. The court ahs heard some additional testimony. Briefs have been filed on the matter regarding the court giving this matter further consideration, and so unless counsel wish to file supplemental briefs I am not going to ask for any.

However, counsel for taxpayers desired the opportunity of filing a brief and counsel for the Commissioner stated (R. 383) in response to the court's inquiry as to whether he wished to file a brief:

> Mr. Transue: * * * our position has been that there has been no ground for a re-hearing, and there has been [fol. 474] no newly discovered evidence or any other justification for a re-hearing.
>
> Of course, we still maintain our contention that the court is without any jurisdiction to give any further consideration to the matter. If Your Honor permits Mr. Bauersfeld to file a brief I would like to have some period thereafter to consider it and see whether I desire to file one.

In response the court stated (R. 383-384):

> On the matter of the continuing objection of the respondent I simply want to say that this seems to be

an extraordinary situation and one which merited the exploring of what is involved in the court's own procedure, and I have given you a report on that.

To what extent do you intend to go into your supplemental brief?

Mr. Bauersfeld, this case as you know, was tried before the court by Harrison and Harkins [*sic*] in Los Angeles, and complete briefs have been filed. When I granted a motion for reconsideration I didn't intend in granting that motion to consider the question de novo. Do you understand?

Mr. Bauersfeld: I understand.

The Court: And I believe you prepared the brief, Mr. Bauersfeld, on the matter of whether we could exercise any discretion in the matter of giving this further consideration. Just exactly what do you want to cover in the supplemental brief?

Mr. Bauersfeld: I would like to cover in the supplemental brief only the new evidence as it may affect the prior decision of the court from a factual standpoint.

[fol. 475] The Court: And you don't intend filing a brief to reargue the case?

Mr. Bauersfeld: Not the entire case, no, Your Honor.

The Court: I think I will have to make it clear that the matter of reconsideration was gone into upon the understanding that you had some new evidence to present. The question now is what additional findings of fact should be made and to what extent the additional evidence may or should be considered in connection with the original briefs. With that understanding you may file a brief.

By orders and decisions entered on June 30, 1955 (R. 138-141, 144-145) the Tax Court stated that it had concluded after hearing held on taxpayers' motion to vacate the decisions and for rehearing on the merits (R. 138-139):

> that there existed extraordinary circumstances and good cause for granting extraordinary relief, namely, (1) further hearing on the merits to enable the petitioner to present new and additional evidence; and

(2) reconsideration by the Court of the issue presented to determine whether the Court made any erroneous conclusion of fact or law in its original findings of fact and conclusions of law. * * * In order to reconsider the issue in this proceeding on the merits and to receive further and additional evidence, the Court vacated its decision entered on April 8, 1954, received further and aditional evidence at a rehearing, and reconsidered the issue on the merits.

[fol. 476] The orders and decisions continue that on the basis of the entire record in the proceeding, the original evidence and additional evidence adduced at the further hearing, the court was not persuaded that it erred in its original findings of fact and conclusions of law and decided that there were deficiencies in income tax for 1943 in the amounts of $224,515.14 and $224,722.55 against the respective taxpayers Jesse Lasky and Bessie Lasky. (R. 139-141, 144-145.) These are the identical amounts determined in the decisions of April 8, 1954. (R. 92-93.) At the same time when it entered these decisions the Tax Court made additional findings of fact. (R. 141-144.) The petitions for review to this Court are from these decisions entered June 30, 1955. (R. 147.)

Wherefore, it is respectfully requested that this Court enter an order dismissing this appeal for lack of jurisdiction on the ground that petitions for review were not filed within three months after the decisions of the Tax Court were rendered.

Charles K. Rice, *Assistant Attorney General.*

March, 1956.

[fol. 477] Notice of Motion

To: Robert Ash, Esquire
Attorney for Petitioners
1921 Eye Street, N. W.
Washington, D. C.

Please take notice that the undersigned will bring the above motion to dismiss on for hearing before the United

States Court of Appeals for the Ninth Circuit at the time and place designated by the Court for the hearing of the cause on the merits.

Charles K. Rice, *Assistant Attorney General.*

March, 1956.

[fol. 478] [File Endorsement omitted]

[Title Omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEMORANDUM BRIEF ON BEHALF OF PETITIONERS IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION—Filed April 16, 1956

Summary of Jurisdictional Facts

On November 28, 1949, the Commissioner of Internal Revenue sent petitioners, by registered mail, notices of deficiencies, in which he determined that the petitioner, Bessie Lasky, owed a deficiency in income tax for the taxable year 1943 in the amount of $224,722.55; and that the [fol. 479] petitioner, Jesse L. Lasky, owed a deficiency for the taxable year 1943 in the amount of $224,515.44 (R. 10-14, 62). Thereafter, on January 9, 1950, petitioners duly filed appeals from said determination with the Tax Court of the United States (R. 7-14). The case was tried before the Tax Court on December 10 and 11, 1951, in Los Angeles, California. On April 8, 1954, the Tax Court promulgated its findings of fact and opinion (R. 62-92) and entered its decision ordering and deciding that the taxpayers owe the deficiencies in income tax for the taxable year 1943 in the amount as determined by the Commissioner of Internal Revenue (R. 92-93).

Thereafter, on August 24, 1954, petitioners filed a motion for leave to file a motion to vacate the decisions out of time and a motion to vacate decisions entered April 8, 1954 (R. 93-94). On December 13, 1954, the Tax Court entered an order vacating and setting aside the decisions

of April 8, 1954 and granted the petitioners a further hearing on the merits (R. 135). Thereafter a rehearing of the case was held in Washington, D. C., on January 21 and January 26, 1955 (R. 300-355). At the rehearing the testimony of the accountant for the petitioners was taken for the first time. Also received was the testimony of Gradwell Sears who was, in 1942, the executive vice-president of United Artists, in charge of world-wide distribution of pictures, who had been, prior to October 1941, president of a subsidiary of Warner Brothers which distributed Warner Brothers pictures. He had been the distributor of the picture "Sergeant York" for Warner Brothers. The testimony of the president of United Artists in 1942 was also taken. Additional testimony of Jesse L. Lasky was received (R. 139-140). On June 30, 1955, the Tax Court in the case of each petitioner entered a memorandum sur order and decision and an order and decision again ordering and deciding upon the rehearing and reconsideration of the case on the merits that there are deficiencies in income tax for the taxable year 1943 as de-
[fol. 480] termined by the Commissioner of Internal Revenue (R. 138-145).

Petitions for review were filed on August 10, 1955, to review the orders and decisions entered by the Tax Court on June 30, 1955 (R. 149).

[fol. 481] ARGUMENT AND SUBMISSION—May 28, 1956

(Omitted in printing)

[fol. 482] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: DENMAN, Chief Judge, LEMMON, Circuit Judge, SOLOMON, District Judge.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—June 13, 1956

Ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk,

and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[fol. 483] In United States Court of Appeals for the Ninth Circuit

No. 14,868

Bessie Laskey and Jesse L. Laskey, *Petitioners*,

vs.

Commissioner of Internal Revenue, *Respondent*.

Petitions for Review of the Decisions of the Tax Court of the United States

Before: Denman, Chief Judge, Lemmon, Circuit Judge, and Solomon, District Judge

Opinion—June 13, 1956

Denman, Chief Judge:

Lasky and his wife seek to petition this court for review of decisions of the Tax Court, "an independent agency in the Executive Branch of the Government".[1] That agency held that over $800,000.00 received by Lasky in connection with the motion picture "Sergeant York" was ordinary income rather than capital gain, and consequently that Lasky and his wife each owe tax deficiencies of over $224,500.00.

The Commissioner challenges the jurisdiction of this Court of Appeals to consider the merits of the claimed right

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[1] 26 U.S.C. § 1100 [now 26 U.S.C. § 7441], reading:

§ 7441. Status.

The Board of Tax Appeals shall be continued as an independent agency in the Executive Branch of the Government, and shall be known as the Tax Court of the United States. The members thereof shall be known as the chief judge and the judges of the Tax Court, Aug. 16, 1954, 9:45 E.D.T. c. 736, 68A Stat. 879.

of review and moved to dismiss the petitions, contending that they were not filed within three months after the de-
[fol. 484] cision of the Tax Court as was required by 26 U.S.C. § 1142 which provided:[2]

> "The decisions of the Tax Court . . . may be reviewed by a court of appeals . . . if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision was rendered . . ."

and by 26 U.S.C. § 1140 making the agency's decision final, reading:

> "§ 1140. Date when Tax Court decision becomes final
> The Decision of the Tax Court shall become final—
> (a Petition for review not filed on time. Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time;"

Clearly here the conditions precedent to the Court of Appeals' jurisdiction to review Tax Court action is the filing of the petition within three months of the Tax Court's first decision which was entered on April 8, 1954. No such petition was filed. Some four months after the decision, on August 23, 1954, the petitioners moved the Tax Court to vacate the decision of April 8, 1954, on the ground of excusable neglect,[3] a power formerly in the federal courts' equity jurisdiction, Cf. Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U.S. 131 (1937), and now contained in Rule 60(b) F.R.C.P. which by Rule 1 is confined to the United States District Courts and not applicable to executive agencies.[4]

Though not a court at all but merely an administrative agency it assumed the power of a district court and in De-

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[2] Now 26 U.S.C. § 7482.

[3] The failure to act in the statutory period was caused by the misfiling of the Tax Court's decisions in the office of petitioners' former attorney by a member of his staff.

[4] Katz v. Commissioner of Int. Rev., 188 F. 2d 957 (Cir. 2, 1951).

cember, 1954, it granted petitioners' motions to vacate its decision of April 8, 1954, and for the taking of additional evidence. After additional evidence was taken, the Tax Court rendered a second decision reaching the same result as in the first. The petition for review of the second decision was filed well within three months of the date it was entered.

[fol. 485] In Swall v. Commissioner of Internal Revenue, 122 F.2d 324 (Cir. 9), cert. denied, 314 U. S. 697 (1941), this Court held that a decision of this administrative agency [then called the Board of Tax Appeals] becomes final three months after it was entered and that thereafter the Tax Court has no power to modify it or reconsider it. The decision was based on the precedent statutes applicable to the agency when it was called the Board of Tax Appeals identical with those cited supra by the Commissioner as the basis of his motion to dismiss.

Our decision in the Swall case was preceded by similar decisions of the First Circuit, Sweet v. Commissioner, 120 F.2d 77, succeeded by a second decision, Denholm & McKay v. Commissioner, 132 F.2d 243; the Second Circuit in Monjar v. Commissioner, 140 F.2d 263; and the Third Circuit in White's Will v. Commissioner, 142 F.2d 746.

Our Swall case and these cases are based on our construction of the word "final" in the §1140 cited supra as the Supreme Court in Helvering v. Northern Coal Co., 293 U.S. 191 (1934) construed the word "final" as used with reference to that court's decisions in the Revenue Act of 1926. There the Supreme Court had rendered its judgment affirming several judgments of the Board of Tax Appeals and issued its mandates. During the term of the court motions for petitions for rehearing were filed which in ordinary cases the court had the jurisdiction to entertain. It held that:

> "Section 1005 (a)(4) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 110, 111, U.S.C., Tit. 26, §640, with respect to decisions of the Board of Tax Appeals, provides:
>
> Sec. 1005 (a). The decision of the Board shall become final— . . .
>
> (4) Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such

Court directs that the decision of the Board be affirmed or the petition for review dismissed.

In view of the authoritative and explicit requirement of the statute and of its application to these cases, the petitions for rehearing are severally denied."

[fol. 486] Some nine years later the Supreme Court again held that the finality provided in the legislation gave it no jurisdiction to afford relief thereafter. R. Simpson & Co. v. Commissioner, 321 U.S. 225, 228 et seq.

Obviously if the Supreme Court lacks the power to reconsider because the decision of the Board has become "final", a fortiori such an agency as the Tax Court likewise lacks the power by the words of Section 1140 that "The decision of the Tax Court shall become final . . . upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within that time."

Counsel for the Laskys, ignoring the Congressional definition of it as an executive agency, contend that the Tax Court is "like other *courts*" and hence as a *court* has the "*inherent* power to control, amend, open and vacate its decisions."

Extraordinary as it is that counsel, without mention of the statutory definition, seeks to have us act as if it did not exist, we find that the Sixth Circuit in Reo Motors v. Commissioner, 219 F.2d 610, similarly ignores the statute and, without mentioning it, treats the Tax Court not as a mere executive agency but as having the inherent power of a United States Court.

In that case the Tax Court, more than three months after its final decision, ordered it set aside on the ground of mutual mistake of fact of both the parties in presenting the case to the agency. The Sixth Circuit holds of this executive agency that it has the jurisdiction so to act since "as a practical matter, it is a court exercising *inherently* judicial functions and having the necessary judicial powers to carry out such functions." It treats the agency as having the powers of a court to grant a writ of error coram nobis.

That court relies on the case of Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1925). There the sole question was whether the Board of Tax Appeals had

the power to make rules governing the right to practice before it. The Supreme Court held the agency had this power because of its "quasi judicial" character, quoting the words of the statute that "The Board shall be an independent agency in the executive branch of the government." Nothing [fol. 487] in that opinion remotely suggests that the agency is a court having the inherent power to issue writs coram nobis. Its quasi judicial powers of making rules, summoning witnesses, *et*s., are no more than are given other executive agencies such as the National Labor Relations Board.

Further, the Sixth Circuit opinion fails to mention the Supreme Court decision in Helvering v. Northern Coal Co., supra, nine years after the Goldsmith decision was rendered. Nor does it consider our decision in the Swall case or the four other Circuit Court decisions cited above. That is to say, it ignores both the governing statute and the precedent opinions on it.

Both the Sixth Circuit and counsel here cite the case of La Floridienne J. Buttengenbach & Co. v. Commissioner, 63 F.2d 630 (Cir. 5, 1933), where the court held *solely* that *on the stipulation of the parties* the Board of Tax Appeals could set aside its final order more than three months after its rendition. Here there is no such stipulation. More important still, the La Floridienne case was decided in 1933, the year before the Supreme Court rendered its Northern Coal Co. decision in 1934, determining that where the statutes make final the action of the taxing agency, no jurisdiction exists after such finality to set the decision aside. The *Buttgenbach* case was specifically critized in our opinion in the *Swall* case, supra. Though parties may stipulate to the jurisdiction of the *person*, they may not do so as to the *subject matter*.

Finally the Laskys stress the decision of the Supreme Court in Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U. S. 131 (1937). In effect, they claim this case overrules the Northern Coal decision of 1934, though it does not mention it. In that case the matter in question was the power not of a mere executive agency but of the bankruptcy court to vacate its own order dismissing a petition for reorganization under 77 B of the bankruptcy act, after the time for appeal had expired and after the term of the court

had ended. The district court held it had such power. The Court of Appeals held it had not and reversed. The Supreme Court reversed, holding the District Court sitting in bankruptcy, had no term and that it could exercise its equitable powers as a bankruptcy *court* to set aside its decision after the time for appeal had expired.

[fol. 488] Here was no overruling of the Northern Coal case for the bankruptcy laws made no such provision for finality of the court's decisions considered in that case, nor is there any such Congressional intent regarding the bankruptcy court as was expressed concerning the Tax Court agency by the Senate Committee Report on the identical predecessor section 1005 of the Revenue Act of 1926 now section 1140, which report stated:

> "Date on which decision becomes final.—Section 1005 prescribes the date on which a decision of the Board (whether or not review thereof is had) is to become final. Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during review of the Commissioner's determination, commences to run upon the day upon which the Board's decision becomes final, it is of utmost importance that this time be specified as accurately as possible. In some instances in order to achieve this result the usual rules of law applicable in court procedure must be changed. For example, the power of the court of review to recall its mandate is made to expire 30 days from the date of issuance of the mandate."

And as a final answer to the contention that the Wayne Gas Co. case overruled the Northern Coal case, is the decision affirming the Northern Coal case in Simpson Co. case, decided seven years after the Wayne Gas case.

We hold the Tax Court was without jurisdiction to set aside its first decision and that this court has no jurisdiction to consider a petition for review of its second decision. The petition for review is ordered dismissed.

[File endorsement omitted.]

[fol. 489] In United States Court of Appeals for the Ninth Circuit

Bessie Lasky and Jesse L. Lasky, Petitioners

vs.

Commissioner of Internal Revenue, Respondent

Judgment—Filed and entered June 13, 1956

Upon petitions to review decisions of the Tax Court of the United States.

This cause came on to be heard on the Transcript of record from the Tax Court of the United States, and upon motion of respondent for dismissal of petitions to review herein, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this court, that the motion to dismiss be, and hereby is granted and that the petitions to review herein be and hereby are dismissed.

[File endorsement omitted.]

[fol. 490] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 490A] [File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 371

BESSIE LASKY and JESSE L. LASKY, Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

STIPULATION AND ADDITION TO RECORD—Filed November 28, 1956

It is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that the Clerk of the Supreme Court shall cause to be printed as part of the record in the case the "Statement of Facts in Support of Motion to Vacate Decisions and for Rehearing" filed in the Tax Court on behalf of petitioners on October 11, 1954. The said "Statement of Facts in Support of Motion to Vacate Decisions and for Rehearing" was inadvertently omitted by the Tax Court Clerk when he sent the record to the Court of Appeals for the Ninth Circuit, but was later certified and transmitted to the Court of Appeals for the Ninth Circuit and was part of the record before that Court when the case was disposed of by the Court of Appeals for the Ninth Circuit.

[fol. 490B-491] A copy of the "Statement of Facts in Support of Motion to Vacate Decisions and for Rehearing" is attached hereto and made a part of this stipulation by reference.

J. Lee Rankin, Solicitor General, The Department of Justice, Washington, D. C., Attorney for Respondent. Robert Ash, 1921 Eye St., N. W., Washington, D. C., Attorney for Petitioner.

November 26, 1956.

[fol. 492] THE TAX COURT OF THE UNITED STATES

Docket Nos. 26396 and 26397

BESSIE LASKY and JESSE L. LASKY, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

STATEMENT OF FACTS IN SUPPORT OF MOTION TO VACATE DECISIONS AND FOR REHEARING

Judge HARRON:

On August 24, 1954, petitioners filed a motion for leave to file motion to vacate decisions out of time. This motion was granted by the Court on August 26, 1954, and a hearing was held on the motion to vacate decisions on September 14, 1954. The motion to vacate the decisions stated that a statement of facts and supporting affidavits would be filed in the near future. The supporting affidavits were filed on September 10, 1954. This statement of facts is filed in accordance with the motion to vacate decisions for purpose of granting petitioners a rehearing of the case on the merits. The Court should exercise its discretion and grant the motion to vacate the decisions and order a rehearing for the following reasons:

(1) The findings of fact and opinion of the Tax Court in the above-entitled case were promulgated April 8, 1954. [fol. 493] (2) Decisions were entered for respondent on April 8, 1954.

(3) As shown by the affidavits heretofore filed, in this case on September 10, 1954, the fact that the decisions were entered did not come to the attention of the petitioners until more than three months elapsed after they were entered.

(4) Copies of the decisions which were mailed to counsel for petitioners did not actually come to counsel's attention upon their receipt as they were inadvertently misfiled. Consequently, on numerous occasions petitioners and other persons making inquiry on their behalf, were advised by their counsel that the decisions had not been received. This

advice was given to petitioners by their counsel through mistake of fact.

(5) Because petitioners had no knowledge that the decisions had been entered on April 8, 1954, and because their counsel advised them affirmatively upon inquiry that the decisions had not been entered, through no fault or negligence of the petitioners they did not file this motion to vacate the decisions within the time allowed by Rule 19(e) of the rules of this Court.

(6) In view of the foregoing, good cause exists which justifies the Court in vacating the decisions heretofore entered on April 8, 1954, for the purpose of granting petitioner a rehearing of the case on its merits. At a rehearing of the case the petitioner would present additional evi-[fol. 494] dence which will show that the opinion and decision of the Court is wrong on its merits. The evidence would show:

(a) That the agreement of May 15, 1940, and the supplemental agreement of May 15, 1940, by which the petitioner sold to Warner Brothers all his right to the Sergeant York Story and Warner Brothers agreed to pay petitioner a part of the gross receipts in varying percentages from the distribution of the photoplay are entirely separate and distinct from the employment contract between petitioner and Warner Brothers dated May 8, 1940.

(b) The evidence would show in detail that a bona fide dispute existed in 1942 between petitioner and Warner Brothers. Additional witnesses would be produced to establish this important fact.

(c) Evidence would be produced to show that the sale by petitioners on December 4, 1942, to United Artists Corporation was a bona fide sale to a third party with no understanding that United Artists Corporation would resell to Warner Brothers. This evi-[fol. 495] dence would show conclusively that United Artists Corporation was not a mere intermediary in the transaction.

(d) The evidence would show in detail the business purpose behind petitioner's sale to United Artists Corporation on December 4, 1942.

(e) Upon receipt of this additional evidence at a rehearing it is petitioner's opinion that the Court will revise its opinion in accordance with the newly-presented facts and hold that the sale by the petitioners of their property rights to United Artists Corporation on December 4, 1942, was a bona fide sale of a capital asset within the provisions of Section 117 of the Internal Revenue Code and that the transaction had been properly reported in their 1942 Federal Income Tax Return. Consequently, the decisions on the rehearing would be that there was no deficiency in tax due from the petitioners for the taxable year 1943.

(S.) Robert Ash, 1921 Eye Street, N. W., Washington 6, D. C., Attorney for Petitioners.

[fols. 496-497] Clerks' Certificates to foregoing paper omitted in printing.

[fol. 498] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 371

BESSIE LASKY and JESSE L. LASKY, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE

ORDER ALLOWING CERTIORARI—Filed November 5, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
AUG 31 1956
JOHN T. FEY, Clerk

No. 371

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

BESSIE LASKY AND JESSE L. LASKY, *Petitioners*

v.

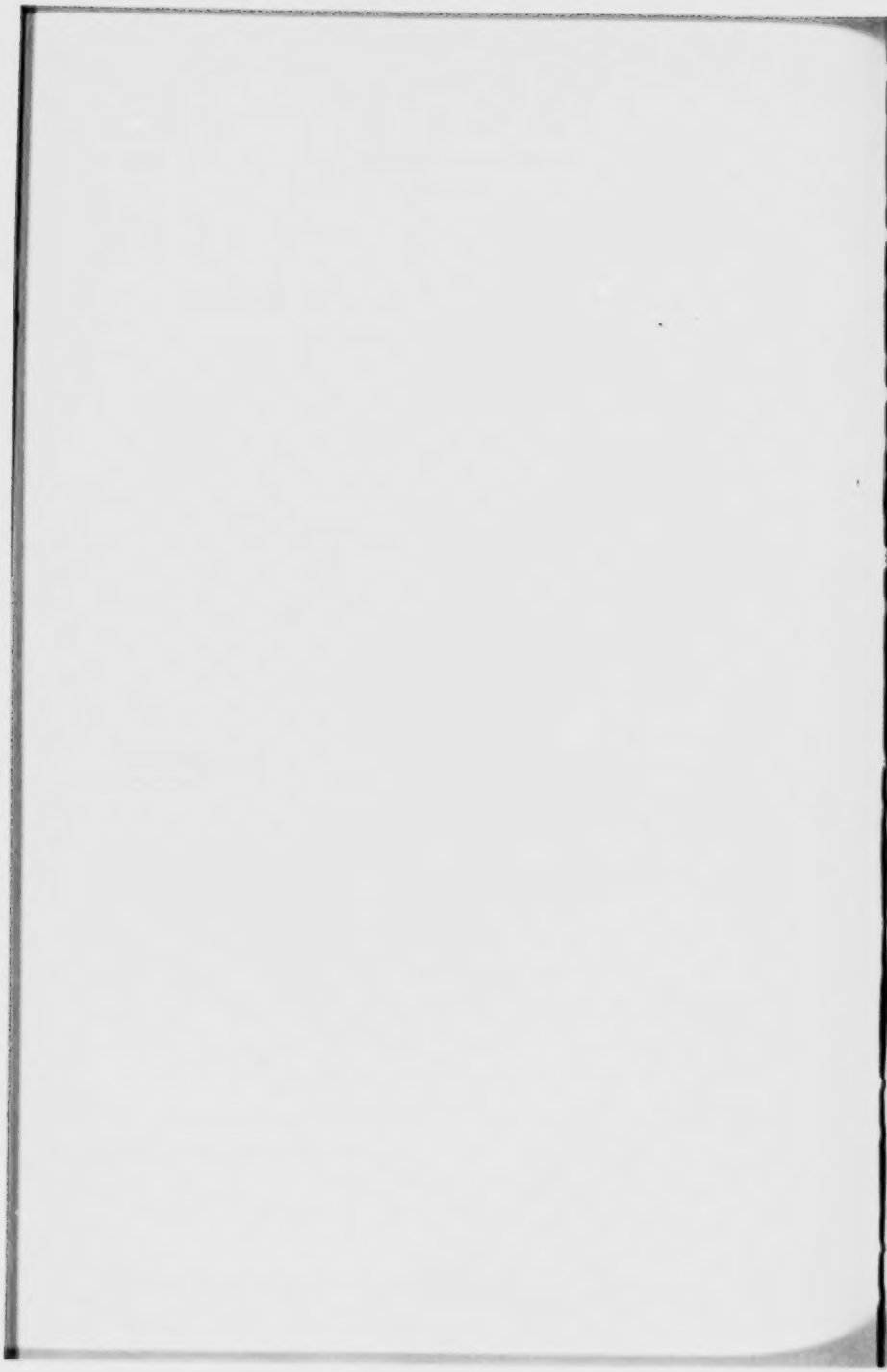
COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT ASH
1921 Eye Street, N. W.
Washington 6, D. C.
Attorney for Petitioners

August 31, 1956

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

BESSIE LASKY AND JESSE L. LASKY, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on June 13, 1956.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is printed in Appendix "B" hereto, p. 4a.

The Findings of Fact and Opinion of the Tax Court of the United States is reported in 22 T.C. 13. (R. 62-92)

The Orders of the Tax Court granting a rehearing herein (R. 135) and the Orders and Decisions of the Tax Court and Memoranda Sur Order and Decision (R. 138-145), which are the basis of this proceeding, are not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 13, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

On April 8, 1954, the Tax Court promulgated its findings of fact and opinion in this case and, on the same date, entered its decisions determining that each of the petitioners owed large deficiencies in income tax for 1943. On August 24, 1954, petitioners filed (a) a motion for leave to file a motion to vacate the decisions out of time and (b) a motion to vacate the decisions entered April 8, 1954.

On December 13, 1954, the Tax Court entered an order vacating and setting aside the decisions of April 8, 1954, and granted the petitioners a further hearing on the merits. Thereafter, a rehearing of the case on the merits was held on January 21 and January 26, 1955.

The questions for decision are:

(1) Did the Tax Court of the United States have the discretionary power to vacate and set aside its decisions of April 8, 1954, and grant petitioners a further hearing on the merits?

(2) Is the Tax Court of the United States a judicial tribunal operating in the Federal judicial system?

(3) If the Tax Court of the United States is not technically a Federal Court, is it a court exercising inherently judicial functions and having the necessary judicial powers to carry out such functions?

STATUTES INVOLVED

The statutory provisions involved are Sections 272, 1117, 1140, 1142, 1145 and 1146 of the Internal Revenue Code of 1939 and Section 7483 of the Internal Revenue Code of 1954. They are printed in Appendix "A" hereto, p. 1a. The Internal Revenue Code of 1954 contains substantially similar provisions to those of the Internal Revenue Code of 1939.

STATEMENT

On November 28, 1949, the Commissioner of Internal Revenue sent petitioners, by registered mail, notices of deficiencies, in which he determined that the petitioner, Bessie Lasky, owed a deficiency in income tax for the taxable year 1943 in the amount of $224,722.55; and that the petitioner, Jesse L. Lasky, owned a deficiency in income tax for the taxable year 1943 in the amount of $224,515.44. (R. 10, 14, 62)

The deficiencies were based on the determination by the Commissioner that the proceeds from the sale by Lasky to United Artists Corporation of Lasky's contract with Warner Bros. Pictures, Inc., which entitled him to participate in the earnings and profits of the motion picture "Sergeant York", were taxable as ordinary income and not as capital gains.

Thereafter, on January 9, 1950, petitioners duly filed appeals from said determination with the Tax Court of the United States (R. 7-14). The case was tried before the Tax Court on December 10 and 11, 1951, in Los Angeles, California. On April 8, 1954, the Tax Court promulgated its findings of fact and opinion (R. 62-92) and entered its decisions ordering and deciding that the taxpayers owed the deficiencies in income tax for the taxable year 1943 in the amount

as determined by the Commissioner of Internal Revenue (R. 92-93).

Thereafter, on August 24, 1954, petitioners filed (a) a motion for leave to file a motion to vacate the decisions out of time and (b) a motion to vacate the decisions entered April 8, 1954 (R. 93-94). On December 13, 1954, the Tax Court entered an order vacating and setting aside the decisions of April 8, 1954 and granted the petitioners a further hearing on the merits (R. 135). Thereafter, a rehearing of the case on the merits was held in Washington, D. C., on January 21 and January 26, 1955. (R. 300-355). At the rehearing, the testimony of the accountant for the petitioners was taken for the first time. Also received was the testimony of Gradwell Sears who was, in 1942, the executive vice-president of United Artists, in charge of world-wide distribution of pictures, who had been, prior to October 1941, president of a subsidiary of Warner Brothers which distributed Warner Brothers pictures. He had been the distributor of the picture "Sergeant York" for Warner Brothers. The testimony of the president of United Artists in 1942 was also taken. Additional testimony of Jesse L. Lasky was received (R. 139-140). On June 30, 1955, the Tax Court in the case of each petitioner entered (a) memorandum sur order and decision and (b) an order and decision again ordering and deciding upon the rehearing and reconsideration of the case on the merits that there are deficiencies in income tax for the taxable year 1943 as determined by the Commissioner of Internal Revenue. (R. 138-145).

Petitions for review were filed in the Court of Appeals on August 10, 1955 to review the orders and

decisions entered by the Tax Court on June 30, 1955. (R. 149)

The Court of Appeals dismissed the appeal on the ground that the Tax Court was without jurisdiction to set aside its decision of April 8, 1954. (R. 483-488; Appendix "B" this petition p. 4a)

REASONS FOR GRANTING THE WRIT

I

The Decision in the Case at Bar is in Direct and Admitted Conflict with the Decision of the Sixth Circuit in Reo Motors, Inc. v. Commissioner, (CA 6, Feb. 23, 1955) 219 F. (2d) 610, on the Question of the Power of the Tax Court to Vacate Its Decisions

In the *Reo* case, after this Court had determined the excess profits tax liability of Reo Motors, Inc. for 1941, (338 U.S. 442) and the decision became "final", the taxpayer asked leave to file a motion asking the Tax Court to vacate its decision. The reason was that the stipulation of facts upon which the Tax Court originally decided the case and was affirmed by this Court, contained a mutual mistake of fact which resulted in an omission from invested capital of over a million dollars. The Tax Court denied the motion for leave to file the motion to vacate the decision.

Upon appeal, the Sixth Circuit reversed the Tax Court, stating:

> "We are of the opinion that the Tax Court should have granted petitioner leave to file its substantive motion. Although the Tax Court is not, technically, a federal court, there has been a consistent and growing recognition that, as a practical matter, it is a court exercising inherently judicial functions and having the necessary judicial powers to carry out such functions. See e.g. *Goldsmith* v. *United States Board of Tax*

Appeals, 270 U. S. 117 (1926); (5 AFTR 5842); *Stern* v. *Commissioner,* 215 F. (2d) 701, 706 (3 Cir. 1954). It would appear to follow that the Tax Court has power in extraordinary circumstances to vacate and correct its decision even after it has become final, similar to the jurisdiction of a court to grant a writ of error *coram nobis.* Cf. *United States* v. *Morgan,* 346 U. S. 502 (1954); *United States* v. *Mayer,* 235 U. S. 55 (1914); Rule 60 (b), Federal Rules of Civil Procedure.

"This jurisdiction was recognized by the Court of Appeals for the Fifth Circuit in *La Floridienne J. Buttgenbach & Co.* v. *Commissioner of Internal Revenue,* 63 F. (2d) 630 (1933), (12 AFTR 257); and very recently, by the Tax Court itself in *Bessie Lasky, Jesse L. Lasky* v. *Commissioner,* Tax Court Dockets Nos. 26396 and 26397 (1954)."

The opinion of the Sixth Circuit in the *Reo Motors* case is set forth in Appendix "C" to this petition at page 11a.

In the case at bar, the Ninth Circuit discusses the *Reo* case at length (R. 486-487) and completely disagrees with it. Among other things, the Ninth Circuit states:

"Extraordinary as it is that counsel, without mention of the statutory definition, seeks to have us act as if it did not exist, we find that the Sixth Circuit, in *Reo Motors* v. *Commissioner,* 219 F. (2d) 610, similarly ignores the statute and, without mentioning it, treats the Tax Court not as a mere executive agency but as having the inherent power of a United States Court."

The Ninth Circuit then states that the Sixth Circuit in the *Reo Motors* case "ignores both the governing statute and the precedent opinions on it."

We submit that the decision in the case at bar is in direct conflict with the decision of the Sixth Circuit in the *Reo Motors* case on the question of the important power of the Tax Court to exercise its discretion as to vacating decisions which have become "final." The only difference in facts is that, in the *Reo Motors* case, the Tax Court refused to exercise its discretion and was required to do so by the Sixth Circuit. In the case at bar, the Tax Court did exercise its discretion and was reversed by the Ninth Circuit for having done so.

II

The Decision in the Case at Bar is in Direct Conflict with the Decision of the Fifth Circuit in La Floridienne J. Buttgenbach & Co., (1933) 63 F. (2d) 630, on the Question of the Power of the Tax Court to Vacate Its Decisions

In the *Buttgenbach* case, the taxpayer and the Commissioner in 1931 executed a joint petition asking the Board of Tax Appeals (now the Tax Court) to vacate and set aside an order entered in 1927 determining a tax liability. The Board of Tax Appeals denied the joint petition because of a supposed lack of power. The Fifth Circuit reversed on the ground that the Board had such power, stating:

> "Whether the Board be treated as a court or a departmental agency with quasi judicial functions, we are of opinion that it may in its discretion vacate such an order as this is, reinstating the matter for hearing before it on its merits or accepting a new stipulation touching the liability."

In the case at bar, the Ninth Circuit completely disagrees with the *Buttgenbach* case but attempts to distinguish it on the ground that the parties stipulated in that case that the decision be vacated. We submit that

the Tax Court has the power to vacate its decisions and a stipulation of the parties has nothing to do with that power. The case must be considered as being in direct conflict with the case at bar. The opinion of the Fifth Circuit in the *Buttgenbach* case is set forth in Appendix "C" to this petition at p. 15a.

III

The Decision in the Case at Bar is in Conflict with the Decision of the Third Circuit in Stern v. Commissioner (1954), 215 F. (2d) 701, on the Question of Whether the Tax Court is a Judicial Tribunal

In the recently decided *Stern* case, the Third Circuit held that the Tax Court is a judicial tribunal. In an opinion supported by numerous citations of authority, the Third Circuit carefully outlines and discusses the powers and duties of the Tax Court. It concludes, contrary to the Ninth Circuit in the case at bar, that the Tax Court is an independent judicial agency. The Third Circuit states:

> "* * * But although Congress in the Internal Revenue Code has continued to call the tribunal 'an independent agency in the Executive Branch of the Government' it has at the same time more realistically designated it as a court and its members as judges. And it is the fact that from its inception as the Board of Tax Appeals in 1924, it has operated only as a judicial tribunal in adjudicating controversies as to tax liabilities arising between taxpayers and the Government. *Its powers are wholly judicial in character.*[8] It has

[8] *Blair* v. *Oesterlein Co.*, 1927, 275 U. S. 220, 227 (6 AFTR 7080); *Helvering* v. *Lazarus & Co.*, 1939, 308 U. S. 252, 255 (23 AFTR 778); *Uncasville Mfg. Co.* v. *Commissioner of Internal Revenue*, 2 Cir. 1932, 55 F. 2d 893, 897 (10 AFTR 1208), cert. den. 286 U. S. 545; *Commissioner of Internal*

never been given any administrative powers or functions nor has it ever had any investigatory, regulatory or policy making duties or powers. Since the passage of the Revenue Act of 1926, its decisions have been final and reviewable only on the record by the United States court of appeals.[9] Since 1948, the scope of that review has been the same as in the case of like decisions of the district courts. The Tax Court is thus for all practical purposes *a judicial tribunal operating in the federal judicial system.* Whether it is a legislative court created by Congress under Article 1, Section 8 of the Constitution, like the Customs Court, or some other form of judicial agency placed for convenience of housekeeping in the Executive Branch of the Government is, therefore, merely a matter of legal semantics since,

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Revenue v. *Liberty Bank & Trust Co.*, 6 Cir. 1932, 59 F. 2d 320, 323 (11 AFTR 488); *Helvering* v. *Continental Oil Co.*, D. C. Cir. 1933, 68 F. 2d 750, 753 (13 AFTR 582), cert. den. 292 U. S. 627; *Irwin* v. *Lawson*, 5 Cir. 1938, 94 F. 2d 187, 190 (20 AFTR 674)

[9] In reporting to the House of Representatives the bill which became the Revenue Act of 1926 the Committee on Ways and Means said:

'In the view of the committee the decisions of the board are judicial and not legislative or administrative determinations. Review of judicial decisions may be had by direct appeal to the courts as well as by petitions to the courts for the enforcement of an administrative order, or by extraordinary remedy and suits for refunds. Further, no rehearing need be provided before the reviewing court, and the review of the decisions of the board may be limited to the record made before the board. The imposition upon the court of the duty of reviewing judicial decisions, such as those of the board, is not the imposition of a nonjudicial duty. . . . ' House Report No. 1 on H. R. 1, 69th Cong., 1st Sess., p. 20.

> whatever it may be called *it is an 'independent' judicial agency* the work of which is not subject to supervision or review in the Executive Branch of the Government, but only by the federal appellate courts." (Emphasis supplied).

In the case at bar, the Ninth Circuit does not mention or discuss the *Stern* decision, which is cited in the *Reo Motors, Inc.* decision, but squarely holds that the Tax Court "is not a court at all but merely an administrative agency." The opinion of the Third Circuit in the *Stern* case is set forth in Appendix "C" to this petition at p. 19a.

IV

The Decision in the Case at Bar is in Conflict with the Intent of Congress as Shown by the Legislative History on the Question of Whether the Tax Court is a Judicial Tribunal

In addition to the quotation from the Ways and Means Committee Report on the Revenue Act of 1926, cited in the footnote to the *Stern* decision, the Finance Committee commented on the status of the Tax Court. The Finance Committee Report[1] dealing with review of Tax Court decisions by the United States Courts of Appeals states:

> "In the view of the committee the decisions of the board are judicial and not legislative or administrative determinations. Review of judicial decisions may be had by direct appeal to the courts (which is the method provided in this bill), and such appeal may be (and is by this bill) made exclusive of other methods, such as by petitions to the courts for the enforcement of an administrative order, or by extraordinary remedy such as injunction, or by suits for refunds. Further, the

[1] Senate Report, No. 52, 69th Congress, 1st Session, p. 37.

review of the decision of the board may be limited to the record made before the board. The imposition upon the court of the duty of reviewing judicial decisions, such as those of the board, can not properly be urged as the imposition of a non-judicial duty, by reason of the fact that the execution of the decision is dependent upon the administrative action of the commissioner in assessing and collecting the tax in accordance with the decision. The duty imposed upon the commissioner in respect of the deficiency decided is not discretionary but non-discretionary, but its performance in accordance with law is mandatory. Such review of a judicial as distinguished from a legislative or administrative determination may be had as to either questions of law or of fact. The proposed procedure, however, for reasons of policy and not of law, limits court review solely to questions of law as heretofore described."

When the Revenue Act of 1928 was under consideration, the House Bill contained a provision to amend the law to make sure it was understood that the Board of Tax Appeals was a judicial and not an investigative body. The Report of the Ways and Means Committee on that Act states:[2]

"Force and Effect of Rules.—A recent decision by the circuit court of appeals for the seventh circuit indicates that there is some disposition to regard the Board of Tax Appeals as an investigative rather than a judicial body, and to require it to reach its decisions not merely on the basis of the evidence presented in the record, but on the basis of such additional evidence outside the record as may be necessary fully to develop the taxpayer's case. The committee is of the opinion that the

[2] House Report No. 2, 70th Congress, 1st Session, p. 30.

board's function is purely judicial, and in order to clarify the situation has provided that no decision of the board (whether rendered before or after the bill becomes law) should hereafter be modified or reversed because the board or any of its divisions has failed to consider evidence not adduced before the board or division. At the same time the committee has provided that the rules of practice and procedure of the board shall, just as the Federal equity rules, have the force and effect of law."

The Finance Committee was of the opinion that because the existing law clearly contemplated judicial and not administrative proceedings by the Board of Tax Appeals, further legislation on the subject was unnecessary. The Finance Committee report states:[3]

"Modification or reversal of board decision.—In view of certain expressions in a recent court opinion, the House bill in section 601 provides that no decision of the board shall be modified or reversed because the board has failed to consider evidence not adduced before it. While an appellate court has the right and duty, if an error of law has been made, to remand a case to the board for subsequent proceedings in accordance with law, the existing provisions of law clearly *contemplate judicial, not administrative, procedure* on the part of the board and the committee can see no need of further legislation on this subject. It is not the duty of the board to make investigations of tax cases but to decide the case on the basis of evidence properly placed before it by the commissioner and the taxpayer." (Emphasis supplied)

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[3] Senate Report No. 960, 70th Congress, 1st Session p. 38.

Despite this legislative history, the Ninth Circuit says that the Tax Court "is not a court at all but merely an administrative agency." We submit that this important question should be settled by this court.

V

The Question Presented Involves an Important Question of Federal Law Which Has Not Been but Which Should be Settled by the Supreme Court

The decision of the Third Circuit in the *Stern* case and the numerous citations therein of decisions of other Courts, the decision of the Sixth Circuit in the *Reo* case and the Congressional Committee reports to the effect that the Tax Court is a court show that the question is of great importance in the administration of the tax laws. As long ago as 1927 this Court, in *Blair* v. *Oesterlein Mach. Co.*, 275 U. S. 220, held with reference to the Board of Tax Appeals (now the Tax Court):

> "An examination of the sections creating the board and investing it with power can leave no doubt that they were intended to confer upon it appellate powers which are judicial in character."

The Ninth Circuit decision in the case at bar throws a cloud on the nature of the Tax Court proceedings which have always been judicial proceedings and so recognized by this Court and other Courts.

If at this late date it should be determined that the Tax Court is not primarily a judicial tribunal and so lacks the powers inherent in such judicial tribunals, innumerable questions can arise as to the Tax Court's procedure and powers. This Court should grant certiorari and thus avoid the confusion and uncertainty which will result if the Ninth Circuit's opinion in the case at bar is permitted to stand.

In addition, because of the volume of litigation handled by the Tax Court, the powers and status of that Court should be defined by this Court. The Annual Report of the Commissioner of Internal Revenue for the fiscal year ended June 30, 1955, (the latest available report) states the Tax Court disposed of 5,315 cases during that fiscal year. 7,861 cases were pending before the Tax Court on June 30, 1955. To illustrate the magnitude of this case load, district courts decided 352 civil tax cases in the same fiscal year. As of June 30, 1955, there were pending in the district courts 2,882 civil tax cases. The various Courts of Appeals decided 326 appeals from the Tax Court during the fiscal year ended June 30, 1955. As of June 1, 1955, 383 such appeals were pending.

CONCLUSION

Because of the admitted conflict between the decision in the case at bar and the *Reo Motors, Buttgenbach* and *Stern* cases, and the intent of Congress as shown by the Committee reports and because of the importance of the question involved, the writ of certiorari should issue.

Respectfully submitted,

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Attorney for Petitioners

August 31, 1956

APPENDIX "A"

Statutes Involved

Internal Revenue Code of 1939:

SEC. 272. PROCEDURE IN GENERAL.

* * * * * * * * *

(b) *Collection of Deficiency Found by Board.*—If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

* * * * * * * * *

(h) *Final Decisions of Board.*—For the purposes of this chapter the date on which a decision of the Board becomes final shall be determined according to the provisions of section 1140.

SEC. 1117. REPORTS AND DECISIONS.

(a) *Requirement.*—A report upon any proceeding instituted before the Board and a decision thereon shall be made as quickly as practicable. The decision shall be made by a member in accordance with the report of the Board, and such decision so made shall, when entered, be the decision of the Board.

(b) *Inclusion of Findings of Fact or Opinions in Report.*—It shall be the duty of the Board and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion, the Board shall report in writing all of its findings of fact, opinions and memorandum opinions.

Appendix "A"

(c) *Date of Decision.*—A decision of the Board (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Board. If the Board dismisses a proceeding for reasons other than lack of jurisdiction and is unable from the record to determine the amount of the deficiency determined by the Commissioner, or if the Board dismisses a proceeding for lack of jurisdiction, an order to that effect shall be entered in the records of the Board, and the decision of the Board shall be held to be rendered upon the date of such entry.

* * * * * * * * *

SEC. 1140. DATE WHEN BOARD DECISION BECOMES FINAL.

The decision of the Board shall become final—

(a) *Petition for Review Not Filed On Time.* Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; * * *

SEC. 1142. PETITION FOR REVIEW.

The decision of the Board rendered after February 26, 1926 (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318 of the Revenue Act of 1926, 44 Stat. 65, 83, relating to hearings before the Board prior to February 26, 1926) may be reviewed by a Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or a taxpayer within three months after the decision is rendered, or, in the case of a decision rendered on or before June 6, 1932, within six months after the decision is rendered.

Appendix "A"

SEC. 1145. BOND TO STAY ASSESSMENT AND COLLECTION.

Notwithstanding any provisions of law imposing restrictions on the assessment and collection of deficiencies, the review under section 1142 shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Tax Court unless a petition for review in respect to such portion is duly filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed has filed with the Tax Court a bond in a sum fixed by the Tax Court not exceeding double the amount of the portion of the deficiency in respect of which the petition for review is filed, and with surety approved by the Tax Court, conditioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts, or additions to the tax provided for by law, or (2) has filed a jeopardy bond under the income or estate tax laws. If as a result of a waiver of the restrictions on the assessment and collection of a deficiency any part of the amount determined by the Tax Court is paid after the filing of the review bond, such bond shall, at the request of the taxpayer, be proportionately reduced."

SEC. 1146. REFUND, CREDIT, OR ABATEMENT OF AMOUNTS DISALLOWED.

In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Tax Court is disallowed in whole or in part by the court, the amount so disallowed shall be credited or refunded to the taxpayer without the making of claim therefor, or, if *collection has not been made*, shall be abated.

Internal Revenue Code of 1954:

SEC. 7483. PETITION FOR REVIEW.

The decision of the Tax Court may be reviewed by a United States Court of Appeals as provided in section 7482 if a petition for such review is filed by either the Secretary (or his delegate) or the taxpayer within 3 months after the decision is rendered. • • •

APPENDIX "B"

Opinion Below

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14,868

June 13, 1956

BESSIE LASKY AND JESSE L. LASKY, *Petitioners,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Petitions for Review of the Decisions of the Tax Court of the United States

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Before: DENMAN, Chief Judge, LEMMON, Circuit Judge, and SOLOMON, District Judge.

DENMAN, Chief Judge:

Lasky and his wife seek to petition this court for review of decisions of the Tax Court, "an independent agency in the Executive Branch of the Government".[1] That agency

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[1] 26 U.S.C. § 1100 [now 26 U.S.C. § 7441], reading:

§ 7441. Status.

The Board of Tax Appeals shall be continued as an independent agency in the executive Branch of the Government, and shall be known as the Tax Court of the United States. The members thereof shall be known as the chief judge and the judges of the Tax Court. Aug. 16, 1954, 9:45 E.D.T. c. 736, 68A Stat. 879.

held that over $800,000.00 received by Lasky in connection with the motion picture "Sergeant York" was ordinary income rather than capital gain, and consequently that Lasky and his wife each owe tax deficiencies of over $224,500.00.

The Commissioner challenges the jurisdiction of this Court of Appeals to consider the merits of the claimed right of review and moved to dismiss the petitions, contending that they were not filed within three months after the decision of the Tax Court as was required by 26 U.S.C. § 1142 which provided:[2]

> "The decisions of the Tax Court . . . may be reviewed by a court of appeals . . . if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision was rendered . . ."

and by 26 U.S.C. § 1140 making the agency's decision final, reading:

> "§ 1140. Date when Tax Court decision becomes final
>
> The Decision of the Tax Court shall become final—
> (a) Petition for review not filed on time. Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time;"

Clearly here the conditions precedent to the Court of Appeals' jurisdiction to review Tax Court action is the filing of the petition within three months of the Tax Court's first decision which was entered on April 8, 1954. No such petition was filed. Some four months after the decision, on August 23, 1954, the petitioners moved the Tax Court to vacate the decision of April 8, 1954, on the ground

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[2] Now 26 U.S.C. § 7482.

of excusable neglect,[3] a power formerly in the federal courts' equity jurisdiction, Cf, Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U.S. 131 (1937), and now contained in Rule 60(b) F.R.C.P. which by Rule 1 is confined to the United States District Courts and not applicable to executive agencies.[4]

Though not a court at all but merely an administrative agency it assumed the power of a district court and in December, 1954, it granted petitioners' motions to vacate its decision of April 8, 1954, and for the taking of additional evidence. After additional evidence was taken, the Tax Court rendered a second decision reaching the same result as in the first. The petition for review of the second decision was filed well within three months of the date is was entered.

In Swall v. Commissioner of Internal Revenue, 122 F. 2d 324 (Cir. 9), cert. denied, 314 U.S. 697 (1941), this Court held that a decision of this administrative agency [then called the Board of Tax Appeals] becomes final three months after it was entered and that thereafter the Tax Court has no power to modify it or reconsider it. The decision was based on the precedent statutes applicable to the agency when it was called the Board of Tax Appeals identical with those cited supra by the Commissioner as the basis of his motion to dismiss.

Our decision in the Swall case was preceded by similar decisions of the First Circuit, Sweet v. Commissioner, 120 F. 2d 77, succeeded by a second decision, Denholm & McKay v. Commissioner, 132 F. 2d 243; the Second Circuit in Monjar v. Commissioner, 140 F. 2d 263; and the Third Circuit in White's Will v. Commissioner, 142 F. 2d 746.

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[3] The failure to act in the statutory period was caused by the misfiling of the Tax Court's decisions in the office of petitioners' former attorney by a member of his staff.

[4] Katz v. Commissioner of Int. Rev., 188 F. 2d 957 (Cir. 2, 1951).

Appendix "B"

Our Swall case and these cases are based on our construction of the word "final" in the § 1140 cited supra as the Supreme Court in Helvering v. Northern Coal Co., 293 U.S. 191 (1934) construed the word "final" as used with reference to that court's decisions in the Revenue Act of 1926. There the Supreme Court had rendered its judgment affirming several judgments of the Board of Tax Appeals and issued its mandates. During the term of the court motions for petitions for rehearing were filed which in ordinary cases the court had the jurisdiction to entertain. It held that:

> "Section 1005(a)(4) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 110, 111, U.S.C., Tit. 26, § 640, with respect to decisions of the Board of Tax Appeals, provides:
>
> Sec. 1005(a). The decision of the Board shall become final— . . .
>
> (4) Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.
>
> In view of the authoritative and explicit requirement of the statute and of its application to these cases, the petitions for rehearing are severally denied."

Some nine years later the Supreme Court again held that the finality provided in the legislation gave it no jurisdiction to afford relief thereafter. R. Simpson & Co. v. Commisisoner, 321 U.S. 225, 228 et seq.

Obviously if the Supreme Court lacks the power to reconsider because the decision of the Board has become "final", a fortiori such an agency as the Tax Court likewise lacks the power by the words of Section 1140 that "The decision of the Tax Court shall become final . . . upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within that time."

Appendix "B"

Counsel for the Laskys, ignoring the Congressional definition of it as an executive agency, contend that the Tax Court is "like other *courts*" and hence as a *court* has the "*inherent* power to control, amend, open and vacate its decisions."

Extraordinary as it is that counsel, without mention of the statutory definition, seeks to have us act as if it did not exist, we find that the Sixth Circuit, in Reo Motors v. Commissioner, 219 F. 2d 610, similarly ignores the statute and, without mentioning it, treats the Tax Court not as a mere executive agency but as having the inherent power of a United States Court.

In that case the Tax Court, more than three months after its final decision, ordered it set aside on the ground of mutual mistake of fact of both the parties in presenting the case to the agency. The Sixth Circuit holds of this executive agency that it has the jurisdiction so to act since "as a practical matter, it is a court exercising *inherently* judicial functions and having the necessary judicial powers to carry out such functions." It treats the agency as having the powers of a court to grant a writ of error coram nobis.

That court relies on the case of Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1925). There the sole question was whether the Board of Tax Appeals had the power to make rules governing the right to practice before it. The Supreme Court held the agency had this power because of its "quasi judicial" character, quoting the words of the statute that "The Board shall be an independent agency in the executive branch of the government." Nothing in that opinion remotely suggests that the agency is a court having the inherent power to issue writs coram nobis. Its quasi judicial powers of making rules, summoning witnesses, etc., are no more than are given other executive agencies such as the National Labor Relations Board.

Further, the Sixth Circuit opinion fails to mention the Supreme Court decision in Helvering v. Northern Coal Co.,

supra, nine years after the Goldsmith decision was rendered. Nor does it consider our decision in the Swall case or the four other Circuit Court decisions cited above. That is to say, it ignores both the governing statute and the precedent opinions on it.

Both the Sixth Circuit and counsel here cite the case of La Floridienne J. Buttgenbach & Co. v. Commissioner, 63 F. 2d 630 (Cir. 5, 1933), where the court held *solely* that *on the stipulation of the parties* the Board of Tax Appeals could set aside its final order more than three months after its rendition. Here there is no such stipulation. More important still, the La Floridienne case was decided in 1933, the year before the Supreme Court rendered its Northern Coal Co. decision in 1934, determining that where the statutes make final the action of the taxing agency, no jurisdiction exists after such finality to set the decision aside. The *Buttgenbach* case was specifically criticized in our opinion in the *Swall* case, supra. Though parties may stipulate to the jurisdiction of the *person*, they may not do so as to the *subject matter*.

Finally the Laskys stress the decision of the Supreme Court in Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U.S. 131 (1937). In effect, they claim this case overrules the Northern Coal decision of 1934, though it does not mention it. In that case the matter in question was the power not of a mere executive agency but of the bankruptcy court to vacate its own order dismissing a petition for reorganization under 77B of the bankruptcy act, after the time for appeal had expired and after the term of the court had ended. The district court held it had such power. The Court of Appeals held it had not and reversed. The Supreme Court reversed, holding the District Court sitting in bankruptcy, had no term and that it could exercise its equitable powers as a bankruptcy *court* to set aside its decision after the time for appeal had expired.

Here was no overruling of the Northern Coal case for the bankruptcy laws made no such provision for finality

of the court's decisions considered in that case, nor is there any such Congressional intent regarding the bankruptcy court as was expressed concerning the Tax Court agency by the Senate Committee Report on the identical predecessor section 1005 of the Revenue Act of 1926 now section 1140, which report stated:

> "Date on which decision becomes final.—Section 1005 prescribes the date on which a decision of the Board (whether or not review thereof is had) is to become final. Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during review of the Commissioner's determination, commences to run upon the day upon which the Board's decision becomes final, it is of utmost importance that this time be specified as accurately as possible. In some instances in order to achieve this result the usual rules of law applicable in court procedure must be changed. For example, the power of the court of review to recall its mandate is made to expire 30 days from the date of issuance of the mandate."

And as a final answer to the contention that the Wayne Gas Co. case overruled the Northern Coal case, is the decision affirming the Northern Coal case in Simpson Co. case, decided seven years after the Wayne Gas case.

We hold the Tax Court was without jurisdiction to set aside its first decision and that this court has no jurisdiction to consider a petition for review of its second decision. The petition for review is ordered dismissed.

(Endorsed:) Opinion. Filed June 13, 1956. Paul P. O'Brien, Clerk.

APPENDIX "C"

Conflicting Opinions

REO MOTORS, INC. v. COMM.

(U. S. Court of Appeals, Sixth Circuit, No. 11300, Feb. 23, 1955)

ARGUED BY: Lee I. Park, Wash., D.C., attorney for petitioner;

Melva Graney, Wash., D.C., attorney for respondent;

ON BRIEF: Lee I. Park, K. Martin Worthy, Arthur Peter, Hamel, Park & Saunders, Wash., D.C., attorneys for petitioner.

H. Brian Holland, Asst. Attorney General; Ellis N. Slack, Melva M. Graney, Spl. Assts., Wash., D.C., attorneys for respondent.

On Petition for Review of an Order of the Tax Court of the United States.

Before ALLEN, MILLER and STEWART, Circuit Judges.

STEWART, Circuit Judge:

In the Tax Court petitioner sought a redetermination of a claimed deficiency in its excess profits tax for 1942. The sole question in issue was whether a capital loss sustained in 1941 could be carried over to 1942 and deducted from gross income for that year as an ordinary operating loss. It was stipulated by the parties in the Tax Court that the Commissioner's computation of petitioner's excess profits net income and excess profits credit, based on invested capital, were correct when computed without the claimed net operating loss deduction or net operating loss deduction adjustment.

The Tax Court decided against the petitioner and entered its decision determining a deficiency in the petitioner's excess profits tax for 1942 in the amount originally determined by the Commissioner. The Tax Court's decision

was affirmed by this court (170 F.[2d] 1001) [37 AFTR 584] and by the Supreme Court (338 U.S. 442) [38 AFTR 981]. The mandate of the Supreme Court issued on February 14, 1950, and the Tax Court's decision accordingly became "final" thirty days thereafter. Section 1140(b)(3) Internal Revenue Code for 1939.

Thereafter, on May 12, 1950, petitioner filed in the Tax Court its "Motion for Leave to File Motion to Withdraw and Reform Stipulation, for Further Hearing and Reconsideration, and to Revise Decision" and an accompanying "Motion to Withdraw and Reform Stipulation, for Further Hearing and Reconsideration, and to Revise Decision." In the substantive motion the petitioner alleged that, because of a mutual mistake of fact, an error had been made in the stipulation of its excess profits credit resulting from the omission from its invested capital of more than two million dollars paid in for stock; that if the correct excess profits credit had been used there would have been no deficiency in petitioner's excess profits tax for 1942; that the Commissioner had admitted this error in connection with another proceeding involving petitioner's excess profits tax liability for 1943; that in 1949 the petitioner had sought relief from its excess profits tax for the year 1942 under § 722 of the Internal Revenue Code of 1939, in response to which the Commissioner had contended that no § 722 relief could be given because the allowance of the petitioner's proper credits would result in no excess profits tax liability for the year 1942, making inapplicable the relief provisions of § 722.[1]

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[1] The letter to the petitioner setting forth the Commissioner's position contained the following language: " . . . the claim for recovery of the excess profits tax for the year 1942 is rejected on the grounds that no excess profits tax was due for the year without regard to the benefits of Section 722. Section 722 grants relief only if the tax computed according to the tax law without benefit of the section results in an excessive and discriminatory tax. The allowance of the taxpayer's property credits under Section 714 was sufficient to result in no tax liability for the year 1942."

In view of the circumstances, the motion stated, "The revision of the decision of this Court in this cause appears to be the only way to correct an obvious mutual mistake and to avoid a gross injustice to petitioner. For these reasons the petitioner urgently prays this Court to permit petitioner to withdraw and reform its stipulation to withdraw its agreement to, and file a substitute recomputation of, excess profits tax liability under Rule 50 and further prays the Court to reconsider the case, to grant further hearing if necessary and to revise its decision to the end that the tax may be correctly determined and a gross injustice avoided."

The motion for leave to file was summarily denied by the Tax Court, and the petitioner has sought review here of the order of denial. The Tax Court gave no reason for its denial, but it is assumed by both parties on this review that the ground for the denial of leave to file was the supposed lack of jurisdiction of the Tax Court to entertain the substantive motion, and we make the same assumption. The petitioner contends that, although the Tax Court's decision had become final before leave to file the motion for reconsideration was sought, the Tax Court should have granted leave to file the motion as one in the nature of a writ of error coram nobis. The petitioner points out that because of a lack of continuity of its officers and accounting personnel through receivership and reorganization, the management was not aware that its books did not reflect its true historical invested capital, and that the use of the correct excess profits credits would have entirely eliminated petitioner's excess profits tax liability for 1942. The petitioner points out that the Commissioner not only concedes this factual error, but is seeking to take advantage of it to the detriment of the petitioner in resisting petitioner's claim under § 722.

The petitioner argues that the mistake of fact here involved is of a kind traditionally within the reach of a writ of error coram nobis, because it is not only material

to the regularity of the decision of the Tax Court, but constitutes a clear and undeniable error, resulting in the incorrect computation of an excess profits tax liability for 1942 in the amount of more than a quarter of a million dollars, instead of no excess profits tax liability at all for such year.

We are of the opinion that the Tax Court should have granted petitioner leave to file its substantive motion. Although the Tax Court is not, technically, a federal court, there has been a consistent and growing recognition that, as a practical matter, it is a court exercising inherently judicial functions and having the necessary judicial powers to carry out such functions. See e.g. Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1926) [5 AFTR 5842]; Stern v. Commissioner, 215 F.(2d) 701, 706 (3 Cir. 1954). It would appear to follow that the Tax Court has power in extraordinary circumstances to vacate and correct its decision even after it has become final, similar to the jurisdiction of a court to grant a writ of error coram nobis. Cf. United States v. Morgan, 346 U.S. 502 (1954); United States v. Mayer, 235 U.S. 55 (1914); Rule 60(b), Federal Rules of Civil Procedure.

This jurisdiction was recognized by the Court of Appeals for the Fifth Circuit in La Floridienne J. Buttgenbach & Co. v. Commissioner of Internal Revenue, 63 F.(2d) 630 (1933) [12 AFTR 257]; and, very recently, by the Tax Court itself in Bessie Lasky, Jesse L. Lasky v. Commissioner, Tax Court Dockets Nos. 26396 and 26397 (1954).

In concluding that the Tax Court has power in its discretion, in extraordinary circumstances, to correct a decision after it has become final, we express no view as to whether the circumstances in this case were so extraordinary as to invite the exercise of that discretion. We hold only that the petitioner should have been granted leave to file its motion, and that the substantive motion should have been entertained and considered on its merits. It may well be that by reason of the petitioner's delay

or for other reasons not appearing in the record the Tax Court will decide the matter against the petitioner on the merits.

For the reasons stated the Tax Court's order denying petitioner's motion for leave to file its substantive motion is reversed, with instructions to grant said motion for leave to file and to entertain and consider petitioner's substantive motion on its merits.

La Floridienne J. Buttgenbach & Co. v. *Commissioner of Internal Revenue*, No. 6496 Circuit Court of Appeals, Fifth Circuit. February 18, 1933

Board of Tax Appeals could, after four years, vacate redetermination of income tax deficiency based on stipulation at instance of parties to stipulation, for good cause shown and reinstate matter for hearing, and could consider question of laches, collusion, or other thing rendering it inadvisable to vacate order (Revenue Act 1926, § 1005 [26 USCA § 1228]).

Joint petition of La Floridienne J. Buttgenbach & Co., taxpayer, and the Commissioner of Internal Revenue to vacate and set aside an order redetermining a tax deficiency and to enter an order agreed on. The Board of Tax Appeals denied the petition, and the taxpayer petitions for review.

Petition for review granted, and further proceedings directed.

J. G. Korner, Jr., of Washington, D.C., for petitioner.

G. A. Youngquist, Asst. Atty. Gen., Sewall Key and Norman D. Keller, Sp. Assts. to the Atty. Gen., and C. M. Charest, Gen. Counsel, Bureau of Internal Revenue, and Shelby S. Faulkner, Sp. Atty., Bureau of Internal Revenue, both of Washington, D.C., for respondent.

Appendix "C"

Before BRYAN, FOSTER, and SIBLEY, Circuit Judges.

SIBLEY, Circuit Judge.

The Board of Tax Appeals denied the joint petition of the taxpayer and the Commissioner of Internal Revenue to vacate and set aside an order redetermining a tax deficiency entered January 19, 1927, and to enter instead an order agreed on. The denial was based on a supposed want of power to set aside the order, as we are assured by counsel and as is indicated by the dissent filed by four members of the Board. The circumstances are extraordinary. The taxpayer, an alien corporation, was assessed with taxes, and its representative, a layman inexperienced in tax matters, conferred with an agent of the Bureau of Internal Revenue in charge of the case, who, not knowing of the changes in the law touching decisions of the Board of Tax Appeals made by the Revenue Act of 1926, represented that the taxpayer's contention that it was not subject to taxation could best be asserted by agreeing on the amount of the tax in a stipulation before the Board, paying the resulting redetermination, and then applying for refund to the Commissioner, who would make the refund if the taxpayer was found not taxable. This was all done by the taxpayer, but the Commissioner after long delay decided on February 25, 1931, that, though the supposed taxpayer was not liable to any tax, and was entitled to have back what had been collected, under the Revenue Act of 1926, § 284 (d), 26 USCA § 1065 (d), he could not make a refund in the face of the redetermination by the Board, notwithstanding the Board had not in fact passed upon the question of nonliability; and that an amendment or correction of the Board's order was necessary. The Commissioner thereupon signed a stipulation with the taxpayer showing the overpayment and its amount, and agreeing that the Board enter an order accordingly. He also joined in the petition which sets up the above facts, agreeing and conceding that the first stipulation was made under a

mutual mistake and misunderstanding carried into the Board's order of January 19, 1927, and praying that it be corrected so that proper refund could be made.

Counsel for the Commissioner here stands to the petition if it can be lawfully granted but as in duty bound contends that the Board after four years cannot vacate its order, especially since Revenue Act of 1926, § 1005 (26 USCA § 1228), expressly declares: "The decision of the board shall become final—(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time. * * * " We appreciate the necessity of prompt decisions touching taxes, and that they shall stand firm. The reviews mentioned in section 1005 no doubt measure the taxpayer's right to litigate, and the Board's decision is final on exhaustion or neglect of them as against further appeals. But it does not follow that the decision may not be further dealt with by the Board itself in its discretion or that no extraordinary relief against it can ever be had. Decisions of the Secretary of the Interior in matters affecting the public lands were by statute declared to be final, but that meant only as to further appeals, and did not exclude the courts from inquiring in extraordinary cases whether the law had been violated thereby. Johnson v. Towsley, 13 Wall, 72, 83, 20 L. Ed. 485. The Secretary himself can sometimes revise his own decision, as when obtained by fraud, though the statute declare it final and conclusive. Lane, Secretary v. United States ex rel. Mickadiet, 241 U.S. 201, 36 S. Ct. 599, 60 L. Ed. 956. So the Secretary of Labor's decisions on deportation proceedings are by statute final, but on extraordinary occasions they are inquired into on habeas corpus. Lindsey, U.S. Immigration Inspector v. Dobra (C.C.A.) 62 F. (2d) 116.

We shall not attempt to formulate any rule as to the control the Board of Tax Appeals has over its own judgments. Analogies have been suggested, ranging from the bill of review in a court of equity to the helplessness of a

special tribunal whose powers perish with the publication of its award. We rest here upon two extraordinary circumstances. The first is that the order to be vacated is not really a judgment of the Board representing its ascertainment of facts and application of the law to them, but is the agreement of the parties put into the form of a judgment, the order so reciting. The Board itself has on the face of its record never ascertained what, if any, taxes the taxpayer owed. The second circumstance is that both parties to the agreement are saying that the stipulation behind the order rests on a false and mistaken basis, and, if the order stands, it operates as a fraud arising out of the confidence that the inexperience of one party put in the knowledge and experience of the other. However unintended the advantage taken of the taxpayer, the Commissioner does not wish to retain it. We think no principle of justice would require that the Board's sanction of the stipulation should bind it to perpetuate the injustice. "We see no reason, either in law or public policy, why any proceeding, however final or conclusive, where the rights of no third party have intervened, may not be opened by the court where all the parties so agreed and the court be thus reinvested with jurisdiction to take further proceedings." Said of a tax assessment in Hewetson v. Chicago, 172 Ill. 112, 49 N.E. 992, 993. The Land Office ordinarily exhausts its powers when a patent is issued, but where by a mistake the patent issued is issued to the wrong person, on its surrender a patent can be issued to the right one. Bell v. Hearne, 19 How. 252, 15 L. Ed. 614. Whether the Board be treated as a court or a departmental agency with quasi judicial functions, we are of opinion that it may in its discretion vacate such an order as this is, reinstating the matter for hearing before it on its merits or accepting a new stipulation touching the liability. In such cases it may, of course, consider whether there be laches, or collusion, or other thing that would render it inadvisable to vacate its order.

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We rule only that a redetermination based on a stipulation may be vacated at the instance of the parties to the stipulation for good cause shown. The petition for review is granted, and further proceedings directed not inconsistent with this opinion.

JULIUS LONG STERN AND ELLEN V. STERN v. COMMISSIONER

(U. S. Court of Appeals, Third Circuit, No. 11226, Sept. 17, 1954)

Petition for review of a decision of the Tax Court of the United States.

Before MARIS, KALODNER and HASTIE, Circuit Judges.

Opinion of the Court

By MARIS, Circuit Judge:

This petition to review a decision of the Tax Court presents the question whether the loss, if any, which the taxpayer sustained upon the sale of his former residence in 1948 was non-deductible for income tax purposes under section 24(b)(1)(A) of the Internal Revenue Code. The facts in the case as found by the Tax Court are these:

The taxpayer,[1] Julius Long Stern, built a residence for himself at 36 West River Street, Wilkes-Barre, Pennsylvania, in 1925, at an approximate cost of $110,000. It is one of the four or five outstanding residences of Wilkes-Barre and is located in the most desirable residential section of the city. The taxpayer occupied the West River Street property as his personal residence until May 1947 when he moved to his new home in West Dallas, Pennsylvania. Construction on the taxpayer's new house had started in March 1946. At that time he decided to sell the West River Street property and discussed the

[1] Taxpayer and his wife, who is not involved in this matter, filed a joint return and hence are joined as petitioners.

matter first in the summer of 1946 with John Howell, and then in September 1946 with Harry Goeringer, both of whom are qualified real estate experts in Wilkes-Barre and who were intimately acquainted with the house at that time. The house was listed for sale first with the office of John Howell and later with Harry Goeringer at a price of $75,000. Later in January 1947, the house was also listed with other real estate offices in Wilkes-Barre. In September 1946 Harry Goeringer appraised the property at a fair market value of $60,000. Intensive efforts to sell the house were carried on by the real estate offices referred to above and the house was advertised for sale and other steps taken to interest prospective purchasers. Several prospects had been shown through the property and in March 1947 Charles S. Popky, through his attorney, submitted an offer to buy the house, including most of the furnishings, for a price of $40,000. The offer was accompanied by a check for $1,000. The furnishings of the West River Street property had been independently appraised by a qualified expert at a fair market value of $10,000. The Popky offer, which was based solely on Popky's ability to pay, was immediately rejected by the taxpayer as being far too low.

The taxpayer had been on the board of directors of the Miners National Bank of Wilkes-Barre for 25 years. In April 1947 he applied to the Miners National Bank for a loan on the West River Street property. As a result of the application Guy W. Moore and Harry Goeringer, both of whom were directors of, and appraisers for, the Miners National Bank, appraised the house for mortgage loan purposes at $50,000 and recommended a loan of 50% thereof to the taxpayer. The loan was granted in the amount of $25,000 and a mortgage for that amount was taken by the Miners National Bank on the property.

On June 5, 1947, Harry Goeringer made a third appraisal of the West River Street property for fair market value sales purposes and fixed the value at $60,000. The

years 1946 and 1947 were years of a very active real estate market in Wilkes-Barre, during which years materials for building purposes were scarce.

In the spring of 1947, the taxpayer's son-in-law, Dr. Samuel Guttman, informed the taxpayer that he had decided to move to Wilkes-Barre and open an office for the practice of psychiatry. This decision of Dr. Guttman was based upon his own judgment, after consultation with his wife but without the advice or suggestion of the taxpayer. Dr. Guttman was motivated by his desire to practice in a smaller community in which he could combine both his home and his office and in which living conditions would be less difficult than in Philadelphia, where he had been practicing. In addition, he was familiar with the area and knew that there was no other practicing psychiatrist in Wilkes-Barre or in Luzerne or Lackawanna counties.

Dr. Guttman inquired whether the taxpayer would rent the West River Street property. The house was expensive for the taxpayer to maintain and, after consultation with Harry Goeringer, the taxpayer decided to rent the house in order to cut down the cost of maintaining two houses. Upon the advice of Goeringer, a rental of $200 a month was set and the taxpayer leased the property at that rental for the period of one year beginning September 1, 1947. This rental was the highest rental for comparable property in Goeringer's experience and was paid from Dr. Guttman's professional earnings. The rental was paid by check and reported by the taxpayer on his income tax return.

Dr. Guttman, who anticipated a rental for longer than one year, made improvements in the West River Street property at a cost of approximately $3,000 in order to make it more readily usable as a combined home and office. The funds for these improvements were derived from Dr. Guttman's professional earnings, which were approximately $20,000 per year for the period 1946 through 1949

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By the summer of 1948, the Popky offer was the only offer received by the taxpayer on the West River Street property and at that time he had a further discussion respecting the property with Goeringer. He was informed that the real estate market in Wilkes-Barre had suffered a substantial decline from the beginning of 1948, caused by the fact that building materials had become more plentiful, that there was a new suburban trend and a new trend toward the ranch-type house, which had resulted in reducing the fair market value of the taxpayer's West River Street property. The taxpayer was further advised by Goeringer that unless he was willing to wait for an indefinite period he would have to take a substantial loss in order to effect a reasonably prompt sale.

Thereupon the taxpayer decided to sell the house at the best price he could get, regardless of the property's fair market value. He was motivated in reaching this decision by the fact that the West River Street property in addition to his own residence was expensive to maintain and by the fact that the West River Street property was encumbered by a mortgage, which was undesirable to the taxpayer. When in the late summer of 1948 Dr. Guttman asked the taxpayer to renew his lease, he was informed that the house was for sale at the best possible price and that the taxpayer was asking $30,000 for the property without the furnishings. Dr. Guttman decided to, and did, purchase the house from the taxpayer at a price of $30,000. From his professional earnings he gave the taxpayer a check in the amount of $7,500 and he gave a check in the amount of $4,500 to the Miners National Bank, which had supplied the balance of the purchase price or $18,000, after taking a mortgage on the property in that amount. The taxpayer's debt to the Miners National Bank was paid in full and his mortgage was thereupon released. All negotiations concerning the sale of the West River Street property were conducted between the taxpayer, Dr. Guttman and the Miners National Bank. The taxpayer's

daughter, Claire Guttman, did not participate in any of these negotiations, nor was she a party to them. On Dr. Guttman's decision, title to the property was taken in the name of Dr. Guttman and Claire Guttman, his wife, as tenants by the entirety in accordance with the usual custom in Pennsylvania and in accordance with the custom of Dr. Guttman and his wife, who had taken title to all property acquired during their marriage, jointly. All of their bank accounts were held by Dr. Guttman, whose professional earnings supplied the funds, and his wife in their joint names, including his professional account. All of the moneys that went into these accounts were from Dr. Guttman's earnings.

At the time of her marriage to Dr. Guttman, Claire Guttman owned in her own name securities worth approximately $15,000, which were drawn upon while Dr. Guttman was pursuing his professional education and experience in his specialty to provide for the support of the family's living expenses. Of these securities, several thousand dollars worth were still owned by Claire Guttman at the time of the sale. After Dr. Guttman started his medical practice in 1945 his professional income was adequate and sufficient to support his family and himself in all respects. The taxpayer was never called upon and never did furnish any of the support of Guttman or his family, with the exception of an occasional gift of cash to his daughter upon occasions of her birthday, Christmas, etc.

Claire Guttman, as well as Dr. Guttman, signed the mortgage and accompanying bond in connection with the sale of the West River Street property and the simultaneous financing of the transaction by the Miners National Bank.

The case was originally tried by Judge Hill and was reviewed by the Tax Court in banc. Although the record is far from clear it appears that a majority of the judges of the court joined in a decision upholding the deficiency in the tax as asserted by the respondent as a result of

the disallowance of the alleged loss on the sale. Judge Opper, in an opinion concurred in by an undisclosed number of his colleagues, held the loss non-deductible under section 24(b)(1)(A) of the Code based upon his conclusion that the sale of the entire property must be regarded as having been made to the taxpayer's daughter. Judge Bruce, in an opinion joined in by Judges Murdock and Turner, concurred in the disallowance of the loss on the ground that the evidence did not establish that the taxpayer had actually suffered a loss. Judge Raum concurred in the result without opinion. Judge Hill, who saw and heard the witnesses, filed a dissenting opinion, joined in by Judges Arundell, Black, LeMire, Johnson and Tietjens, in which he concluded that the sale was in fact made to Dr. Guttman and not to his wife, that the taxpayer in fact suffered the loss which he claimed and that it was legally deductible by him for income tax purposes. Judge Van Fossan dissented without opinion 21 T.C.—.

The decision of the Tax Court must be reversed. Section 24(b) of the Internal Revenue Code in pertinent part provides:

> "(b) Losses from sales or exchanges of property
>
> "(1) Losses disallowed. In computing net income no deduction shall in any case be allowed in respect of losses from sale or exchanges of property, directly or indirectly—
>
> "(A) Between members of a family, as defined in paragraph (2)(D);
>
> * * * * *
>
> "(2) Stock ownership, family, and partnership rule. For the purposes of determining, in applying paragraph (1), the ownership of stock—
>
> . . .
>
> "(D) The family of an individual shall include only his brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants; . . . "

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Applying these statutory provisions to the case before us it will be seen that the loss, if any, which the taxpayer suffered upon the sale of the West River Street property was deductible by him for income tax purposes unless it was a sale between himself and his daughter, Claire Guttman. If it was a sale between himself and his son-in-law, Dr. Guttman, the loss was deductible, since a son-in-law is not within the class defined by section 24(b)(2)(D).[2] We are in complete accord with the views expressed by Judge Hill in his dissenting opinion that the sale in this case was between the taxpayer and Dr. Guttman and that no sale in fact took place to Claire Guttman who supplied no part of the consideration for the sale and received her interest in the property as a tenant by the entirety purely as a gift from her husband. Indeed the findings of fact of the Tax Court compel this conclusion for the court found: "Dr. Guttman decided to, and did, purchase the house from the petitioner at a price of $30,000. . . . The petitioner's daughter did not participate in any of these negotiations, nor was she a party to them."

The opinion filed by Judge Opper is based upon the proposition that under the law of Pennsylvania Claire Guttman became the owner of the entire property as a tenant by the entirety and accordingly was vendee of her father as to the whole property. The premise may be admitted but the conclusion sought to be drawn does not follow. For the fact that Mrs. Guttman acquired an estate by the entirety in the property under Pennsylvania law as a result of the direction of her husband that she be included as a grantee in the deed of conveyance did not make her, what in actual fact she was not, the purchaser of the property on a sale by her father, within the meaning of the Internal Revenue Code. As Judge Hill well said in his dissenting opinion, 21 T.C. —, "the majority relies

[2] Topek v. Commissioner of Internal Revenue, 1947, 9 T.C. 763, 766.

upon legal fiction in the effort to establish that a sale between the petitioner and his daughter was accomplished as a matter of law. The fiction relied upon belongs to the law of real property. It had its roots in the common law and was born centuries before income taxation was a gleam in the fiscal eye of government. This fiction argues that husband and wife are one. In the enactment and administration of revenue laws, fact rather than fiction is made to prevail." See Wisotzkey v. Commissioner of Internal Revenue, 3 Cir. 1944, 144 F.2d 632, 636 [32 AFTR 1240].

Moreover, the contention proves too much. For if Mrs. Guttman is to be regarded as grantee of the whole property under the Pennsylvania law of tenancy by the entirety and therefore as sole purchaser from the taxpayer, her husband, Dr. Guttman, must likewise under the same law be regarded as grantee of the whole and, therefore, likewise sole purchaser. It is obvious that at this point the fiction of the Pennsylvania law breaks down so far as concerns its usefulness to solve the tax question which is before us and that the question can only be solved upon a practical view of the actual facts of the case, disregarding the fictions of the ancient law of real property.

Holding, as we do, that any loss which the taxpayer sustained in the sale of the West River Street property to Dr. Guttman was deductible by the taxpayer in computing his taxable income for 1948, we are next met with the question whether he in fact sustained any loss in the transaction. This depends upon whether on September 1, 1947, when he first rented the property, its fair market value was more than $30,000, the amount for which he sold it to Dr. Guttman in late 1948. Witnesses for the taxpayer testified that the value on September 1, 1947 was $60,000. A witness for the respondent on the other hand testified after some equivocation that the value was only $30,000.

The Tax Court made no finding as to the 1947 value although it appears that a majority of the judges who expressed their views upon the question, including the

judge who took the testimony, found that the value was $60,000 as contended for by the taxpayer. This was the view taken by Judge Hill and the five judges who concurred with him. On the other hand only Judge Bruce and the two judges who concurred with him expressed the view that no loss had been suffered. Neither Judge Opper who wrote an opinion concurred in by an undisclosed number of other judges, Judge Raum who concurred in the result, or Judge Van Fossan who dissented, expressed any views on this question. Thus of the nine judges, a majority of the court in banc, who expressed their views six, a majority of that group, found the value to be $60,000. But the fact remains that six or, perhaps seven of their brethren in the court in banc did not deem it appropriate to consider the question. Under these circumstances we think it proper for the case to go back for a definitive determination of the September 1, 1947 value.

In sending the case back to the Tax Court we deem it proper to direct the court's attention to its failure to disclose in its report the names of all the judges who participated in the review of the case by the court in banc. The Internal Revenue Code provides that the full court may, when so directed by the chief judge, review a decision proposed by a division of the court[3] and that a majority of the sixteen judges of the court shall constitute a quorum for this purpose.[4] It is an accepted principle of judicial procedure that a judicial tribunal should disclose on its public record the members of the tribunal who have participated in camera in its decisions.[5] Only thus can the parties know whether a quorum of qualified judges has decided their controversy. The need of such disclosure is particularly well illustrated by this case. For it is well known that judges of the Tax Court are constantly re-

[3] Internal Revenue Code of 1954, § 7460(b).

[4] Internal Revenue Code of 1954, § 7444(d).

[5] State v. King, 1844, 27 N.C. 203; 21 C.J.S. Courts § 183 a.

quired to be absent from Washington to preside at hearings in other cities. Such judges may well not be able to participate in the review of a case by the full court while they are on circuit. And yet in this case at least fifteen of the sixteen judges must have participated since seven of them dissented from the decision which the court entered. The record discloses the names of twelve of these judges but neither we nor the parties know from the record how many others participated or who they were.

The practice of the Tax Court in this respect appears to follow that of an administrative agency rather than that of a judicial tribunal. But although Congress in the Internal Revenue Codes has continued to call the tribunal "an independent agency in the Executive Branch of the Government" it has at the same time more realistically designated it as a court and its members as judges.[6] And it is the fact that from its inception as the Board of Tax Appeals in 1924 it has operated only as a judicial tribunal in adjudicating controversies as to tax liabilities arising between taxpayers and the Government.[7] Its powers are wholly judicial in character.[8] It has never been given any administrative powers or functions nor has it ever

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[6] Act of October 21, 1942, § 504(a), 56 Stat. 957; Internal Revenue Code of 1954, § 7441.

[7] The jurisdiction which the Tax Court has exercised since 1942 under the Renegotiation Acts is likewise judicial in nature, involving controversies between government contractors and the Government as to whether profits received by such contractors are excessive when measured by the standards laid down in the Acts. Maguire Industries v. United States, 1949, 114 Ct. Cl. 687, 86 F. Supp. 905, cert. den. 340 U.S. 809.

[8] Blair v. Oesterlein Co., 1927, 275 U.S. 220, 227 [6 AFTR 7080]; Helvering v. Lazarus & Co., 1939, 308 U.S. 252, 255 [23 AFTR 778]; Uncasville Mfg. Co. v. Commissioner of Internal Revenue, 2 Cir. 1932, 55 F. 2d 893, 897 [10 AFTR 1208], cert. den. 286 U.S. 545, Commissioner of Internal Rev. v. Liberty Bank & Trust Co., 6 Cir. 1932, 59 F. 2d 320, 323 [11 AFTR 488]; Helvering v. Continental Oil Co., D.C. Cir. 1933, 68 F. 2d 750, 753 [13 AFTR 582], cert. den. 292 U.S. 627; Irwin v. Lawson, 5 Cir. 1938, 94 F. 2d 187, 190 [20 AFTR 674].

had any investigatory, regulatory or policy-making duties or powers. Since the passage of the Revenue Act of 1926 its decisions have been final and reviewable only on the record by the United States courts of appeals.[9] Since 1948 the scope of that review has been the same as in the case of like decisions of the district courts.[10] The Tax Court is thus for all practical purposes a judicial tribunal

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[9] In reporting to the House of Representatives the bill which became the Revenue Act of 1926 the Committee on Ways and Means said:

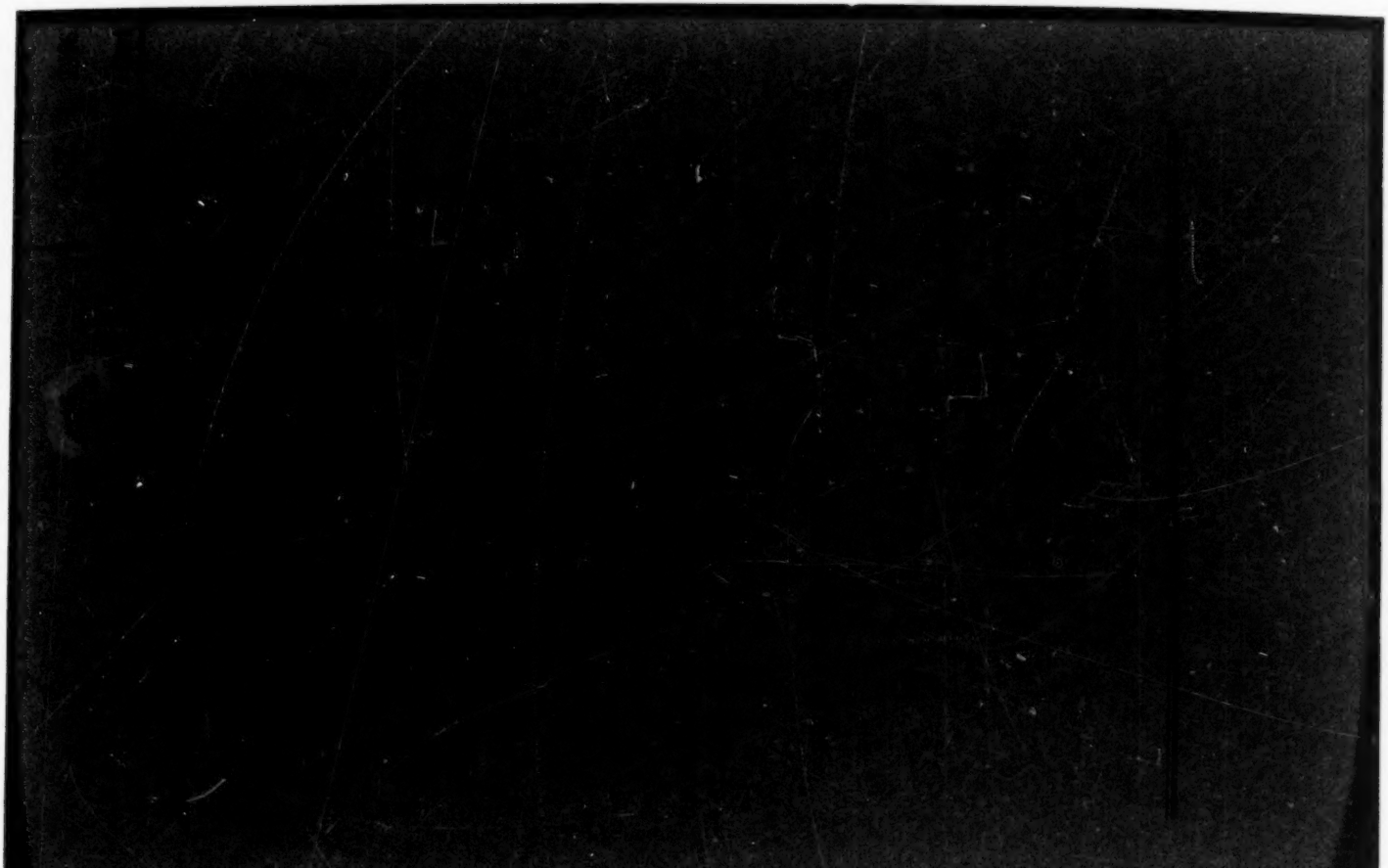
"In the view of the committee the decisions of the board are judicial and not legislative or administrative determinations. Review of judicial decisions may be had by direct appeal to the courts as well as by petitions to the courts for the enforcement of an administrative order, or by extraordinary remedy and suits for refunds. Further, no rehearing need be provided before the reviewing court, and the review of the decision of the board may be limited to the record made before the board. The imposition upon the court of the duty of reviewing judicial decisions, such as those of the board, is not the imposition of a nonjudicial duty . . . " House Report No. 1 on H.R. 1, 69th Cong., 1st Sess., p. 20.

[10] This was accomplished by section 36 of the Act of June 25, 1948, 62 Stat. 991, which amended section 1141(a) of the Internal Revenue Code of 1939 so as to make the decisions of the Tax Court reviewable by the courts of appeals "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." It is clear that by this action Congress intended (see Senate Report No. 1559 on H.R. 3214, 80th Cong., 2d Sess., pp. 2, 13) to repeal the rule laid down in Dobson v. Commissioner, 1943, 320 U.S. 489 [31 AFTR 773], which had severely limited the scope of review of Tax Court decisions upon the theory that the court was a specialized administrative body. Congress thus made plain that it regarded the Tax Court as a judicial tribunal rather than an administrative agency and intended that its decisions should be subject to the same review accorded judicial decisions.

This action by Congress following its previous action in 1942 in calling the agency a court and its members judges rendered obsolete Chief Justice Taft's early dictum in Old Colony Tr. Co. v. Comm'r Int. Rev., 1929, 279 U.S. 716, 725 [7 AFTR 8875], that "The Board of Tax Appeals is not a court. It is an executive or administrative board, upon the decisions of which the parties are given an opportunity to base a petition for review to the courts after the administrative inquiry of the Board has been had and decided."

operating in the federal judicial system. Whether it is a legislative court created by Congress under Article I, section 8, of the Constitution, like the Customs Court, or some other form of judicial agency placed for convenience of housekeeping in the Executive Branch of the Government is, therefore, merely a matter of legal semantics since, whatever it may be called, it is an "independent" judicial agency the work of which is not subject to supervision or review in the Executive Branch of the Government but only by the federal appellate courts. The court should accordingly follow accepted forms of judicial procedure by indicating in some appropriate way on its record in each case reviewed by the full court the names of the judges who participate in the decision ultimately rendered.

The decision of the Tax Court will be reversed and the cause will be remanded for further proceedings not inconsistent with this opinion.



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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 371

BESSIE LASKY AND JESSE L. LASKY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 62-92) rendered on the merits after the original hearing is reported at 22 T.C. 13. The memorandum opinion of the Tax Court after rehearing (R. 138-144) is not reported. The opinion of the Court of Appeals (Pet. App. 4a-10a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1956. (R. 489.) The petition for a writ of certiorari was filed on August 31, 1956. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the Court of Appeals was correct in dismissing the petitions for review on the ground that before the petitions were filed the Tax Court decisions had become final and the limitation period had expired within the meaning of Sections 1140 and 1142 of the Internal Revenue Code of 1939.

STATUTES INVOLVED

Sections 272(b) and (h), 1100, 1113, 1117(a), (b) and (c), 1140(a) and 1142 of the Internal Revenue Code of 1939 and Section 7483 of the Internal Revenue Code of 1954 are set forth in the Appendix, *infra*, pp. 17-21.

STATEMENT

The Court of Appeals granted the Commissioner's motion to dismiss for lack of jurisdiction taxpayers' petitions for review on the ground that the petitions for review were not filed within three months after the decisions of the Tax Court were rendered as required by Section 1142 of the Internal Revenue Code of 1939 and Section 1140 providing when the Tax Court's decisions become final. (R. 460-476; Pet. App. B 5a, 10a.) The facts are not in dispute.

On April 8, 1954, the Tax Court promulgated its findings of fact and opinion in these consolidated cases (R. 62-92) after hearing had on December 10 and 11, 1951 (R. 2). The opinion concluded with the following words (R. 92): "The respondent's determination is sustained. Decisions will be entered for the respondent." On April 8, 1954, the Tax Court rendered its decision in each case, deciding in the case of taxpayer Bessie Lasky that there is a deficiency in income tax for 1943 in the amount of $224,722.55, and in the case

of taxpayer Jesse L. Lasky in the amount of $224,515.14. (R. 92-93.) A copy of each of these decisions was served by the Clerk of the Tax Court on April 9, 1954, by registered mail on Mr. Herschel B. Green, the first attorney of record for the taxpayers in the Tax Court proceeding. (R. 92-93, 105, 128.) No petition for review of these decisions in the Court of Appeals was filed within three months after April 8, 1954, the date the decisions were rendered.

Up to this point taxpayers had been represented in the Tax Court by Messrs. Herschel B. Green and Loyd Wright of Wright, Wright, Green and Wright, and Mr. Harrison Harkins. (R. 62.) However, on or about August 24, 1954, after expiration of the three months' period following the rendering of the decisions by the Tax Court, the present attorney for taxpayers filed with the Tax Court a motion for leave to file a motion to vacate its decisions out of time. (R. 93-94.) Such leave was granted, and on August 24, 1954, taxpayer moved to vacate the decisions of April 8, 1954. The following appears from the four affidavits (R. 95) filed in support of this motion:

Shortly after April 8, 1954, there were received at the offices of Wright, Wright, Green and Wright the findings of fact and opinion of the Tax Court in these cases, and on April 14, 1954, a conference was held at those offices attended by taxpayer Jesse Lasky, his secretary, Mr. Rogers, and his attorneys, Mr. Harkins, Judge Milliken, Mr. Wright and Mr. Green (R. 95, 101), at which the findings of fact and opinion of the Tax Court were discussed, including such matters as the possibility of reversal on appeal and of compromise (R. 95-96, 99, 101-102, 103-104). Mr. Lasky was told in

the course of this conference that the Tax Court decisions in these cases would be received separately from the findings and opinion and he would have three months after the date the decisions were entered within which to appeal. (R. 96, 99, 102, 104.) Mr. Green promised to notify Mr. Lasky on the receipt of the decisions. (R. 102.)

What occurred subsequently is stated in Mr. Green's affidavit as follows (R. 102-103):

> Thereafter, Affiant talked with Mr. Lasky, or his secretary, on two or three occasions, when Affiant was asked if the Decisions had been received, and Affiant informed him on each occasion that they had not. During one or two telephone conversations with Mr. Harkins, we made mention of the fact that the Decisions had not been received and that Affiant was keeping a constant lookout for the reecipt [sic] of these Decisions, having in mind the ninety-day appeal period above referred to.
>
> On or about July 26, 1954, Mr. Harkins informed Affiant that he had received word from the desk of the Tax Clerk that the Decisions had been entered in the two cases on April 8, 1954, and that copies thereof had been mailed to us. Affiant thereupon made an imediate search of the Lasky files in his office, and at that time and for the first time discovered copies of the two Decisions. They were on letter-size paper and had been permanently placed in one of the Lasky files on the correspondence side of the file rather than the legal side. Affiant thereupon, on that same day, telephoned Mr. Lasky and informed him that in going through his

> files Affiant had found the two Decision[s] and *they* they [sic] were dated April 8, 1954.

Mr. Harkins stated that under date of July 20, 1954 (R. 104), he wrote the Clerk of the Tax Court inquiring about the status of the proceedings and (R. 105)—

> That on July 26, 1954, your affiant received a letter from the Clerk of the Court, dated July 23, 1954, informing him that the decisions had been entered and had been served April 9, 1954, upon the first counsel of record in the proceedings, Herschel B. Green, Esq., 111 West Seventh Street, Los Angeles 14, California; * * *

Taxpayers' motion to vacate the decisions was heard on September 14 and 16, 1954. (R. 106-133.) At the hearing the following colloquy between court and counsel for taxpayers occurred (R. 126-128):

> The Court: * * * I wonder, Mr. Ash, if any explanation has been given to you about why Mr. Harkins, for example, waited so long to ask Mr. Mersch [Clerk of the Tax Court] about the entry of the decisions. As you all know, decisions to be entered for Petitioner and Respondent, even if you had a complicated order to write, would not take more than a half hour to have drafted, typed, and signed. * * *
>
> * * * * *
>
> Mr. Ash: The only explanation I have is—first of all, I will preface it by saying that any of us who do tax work would certainly take the position that Your Honor is taking, because you recognize that

the decision would be simultaneous practically with the findings of fact and opinion except in some unusual situations like you mentioned. The only possible explanation is that, of course, Harkins did repeatedly ask Mr. Green if the decisions had come down and was assured that they had not.

As I understand it, for some reasons the Tax Court sent copies of the findings of fact and opinion to each of the counsel of record but, of course, following the established practice that we all know, the decisions went only to Mr. Green.

The Court: That still does not give me an answer to the question.

Mr. Ash: I do not know the answer.

* * * * *

Mr. Ash: I cannot understand it and I was astonished as could be when I first heard of this thing, which was just shortly before Mr. Heubusch of our office came down and looked through the file and said there is not a thing in the file since the entry of decisions, no motions or anything, and we just could not believe that that could happen, but it did.

The Court: The Calendar Section tells me that the decisions went by registered mail April 9. I guess they went by ordinary mail, not airmail, so it probably reached Los Angeles a week later.

The Commissioner, though expressing regret that the situation had arisen, repeatedly made clear his objection to the granting of the taxpayers' motion to vacate on the ground that the Tax Court was without jurisdiction in the premises. (R. 112-113, 120-122, 129.)

At the hearing of September 14 and 16, 1954 (R. 106-133), no suggestion was made on taxpayers' behalf that a rehearing was desired for the purpose of offering additional evidence on the merits. Nevertheless, subsequently on or about October 11, 1954, taxpayers moved for leave to file an amendment to their motion to vacate the decisions, stating (R. 133) "The purpose of the motion to vacate the decisions is to obtain a rehearing of the case on its merits." Such leave was granted, and the pending motion to vacate the decisions was amended by the addition of the italicized words (R. 134):

> Come now the above-named petitioners by their attorney, Robert Ash, and move the Court vacate the decisions entered herein on April 8, 1954, *for the purpose of granting petitioners a rehearing of the case on its merits.* [Italics supplied.]

See also R. 469-472.

Thereafter, without any further proceedings, the Tax Court on December 13, 1954, granted taxpayers' amended motion and ordered (R. 135)—

> That the decision in each proceeding which was entered on April 8, 1954, be vacated and set aside for the purpose of granting petitioners a further hearing on the merits.

The Acting Chief Counsel, Internal Revenue Service, moved to vacate this order of December 13, 1954, on the ground that the Tax Court's decision had become final and the court was without power to grant taxpayers' motion. (R. 136-137.) This motion was denied, as was also a motion for review by the entire Tax Court of the order vacating the decisions. (R. 137.)

Pursuant to the order of December 13, 1954, the Tax Court held a further hearing (January 21 and 26, 1955), devoted exclusively to the merits. (R. 300-385.) Testimony of four witnesses was taken, including Mr. Lasky's accountant and his own additional testimony. (R. 139-140.) The Commissioner once more stated his objection to the new hearing on the ground that the Tax Court was without jurisdiction. (R. 383.)

By orders and decisions entered on June 30, 1955 (R. 138-141, 144-145), the Tax Court stated that it had concluded (R. 138-139)—

> that there existed extraordinary circumstances and good cause for granting extraordinary relief, namely, (1) further hearing on the merits to enable the petitioner to present new and additional evidence; and (2) reconsideration by the Court of the issue presented to determine whether the Court made any erroneous conclusion of fact or law in its original findings of fact and conclusions of law. * * * In order to reconsider the issue in this proceeding on the merits and to receive further and additional evidence, the Court vacated its decision entered on April 8, 1954, received further and additional evidence at a hearing, and reconsidered the issue on the merits.
>
> The petitioner diligently and seasonably filed his motion for rehearing and reconsideration on the merits. This Court is continuously in session; it is not in session for a term or terms. The petitioner's motion was not filed, therefore, after a "term" of this Court had expired during which the original decision was entered.

However, the Tax Court further held on the basis of the original evidence and the additional evidence advanced at the further hearing, that it was not persuaded that it had erred in its original findings of fact and conclusions of law. It held, accordingly, that there were deficiencies in the identical amounts originally determined in the April 8, 1954, decisions.

From these decisions, entered June 30, 1955, taxpayers filed petitions for review in the court below. The Court of Appeals granted the Commissioner's motion to dismiss these petitions on the ground that the Tax Court was without jurisdiction to set aside its first decisions, and that the Court of Appeals had no jurisdiction to consider petitions to review the second decisions. (Pet. App. 10a.)

ARGUMENT

1. The court below was correct in holding that it had no jurisdiction to entertain the petitions for review. It is well settled by numerous cases decided by this Court and by the Courts of Appeals that, under Sections 1140 and 1142 of the Internal Revenue Code of 1939 (Appendix, *infra*, pp. 19-20), the April 8, 1954, decisions of the Tax Court became "final" after the expiration of three months, or on July 8, 1954, without the qualifications which may exist in regard to ordinary judgments. Hence, the Tax Court was without power to make its order of December 13, 1954, vacating these decisions and granting taxpayers a further hearing on the merits (R. 135) or to render its decisions of June 30, 1955, after rehearing (R. 138-141, 144-145) from which the appeals dismissed by the court below were taken.

Congress has not only fixed a three month limitation after which a petition for review by a Court of Appeals may not be filed (Internal Revenue Code, Section 1142) [1] but, in addition, directed explicitly and in detail the specific times when decisions of the Tax Court "shall become final" (Section 1140 of the Code), as stated by this Court (*Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716, 726), "in respect to all the numerous instances which in the course of the review may naturally end further litigation." Thus, Tax Court decisions "become final * * * Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time." Section 1140(a).[2] Indeed, this Court has held itself deprived by the explicit requirements of Section 1140 (and its predecessor) of jurisdiction in cases, originating with the Tax Court to grant petitions for rehearing filed after expiration of the period provided by the Rules of the Court. *Helvering* v. *Northern Coal Co.*, 293 U. S. 191; *R. Simpson & Co.* v. *Commissioner*, 321 U. S. 225. Hence, contrary to the view expressed by the Tax Court here (R. 139), it is immaterial, even if correct, that the sessions of the Tax Court are not limited by a "term."

While it is true that Congress has defined the "status" of the Tax Court "as an independent agency in the Executive Branch of the Government" (Internal Revenue Code, Section 1100, Appendix, *infra*, p. 18),[3] the result here in no way turns upon this definition or upon any "status" peculiar to the Tax Court, but upon

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[1] References to "Internal Revenue Code" or "Code" are, unless otherwise indicated, to the Internal Revenue Code of 1939.

[2] Congress has substantially continued the provisions of Section 1140 in the Internal Revenue Code of 1954, Section 7481.

[3] Congress has continued this definition of the "Status" of the Tax Court in the Internal Revenue Code of 1954, Section 7441.

a lack of power to reconsider, after decisions of the Tax Court have become final under Section 1140, which this Court has held binding upon itself in the cases above cited, and which the Courts of Appeals have also repeatedly decided is binding upon them as well as upon the Tax Court. *Commissioner* v. *Realty Operators*, 118 F. 2d 286 (C.A. 5); *Sweet* v. *Commissioner*, 120 F. 2d 77 (C.A. 1); *Crews* v. *Commissioner*, 120 F. 2d 749 (C.A. 10), certiorari denied, 314 U. S. 664; *Swall* v. *Commissioner*, 122 F. 2d 324 (C.A. 9), certiorari denied, 314 U. S. 697; *Denholm & McKay Co.* v. *Commissioner*, 132 F. 2d 243 (C.A. 1); *McCarthy* v. *Commissioner*, 139 F. 2d 20 (C.A. 7); *Monjar* v. *Commissioner*, 140 F. 2d 263 (C.A. 2); *White's Will* v. *Commissioner*, 142 F. 2d 746 (C.A. 3).[4]

The importance of the date, when the Tax Court decision becomes final, in the scheme of the statute setting up the Tax Court and providing for review of its decisions, is apparent from other references to it in the Code in connection with assessment of the tax.[5] In-

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[4] The rule has of course been applied against the Commissioner as well as against taxpayers. *Helvering* v. *Northern Coal Co.*, *supra*; *Commissioner* v. *Realty Operators*, *supra*; *Denholm & McKay Co.* v. *Commissioner*, *supra*.

[5] Thus, the Commissioner is required in case of a deficiency to serve a notice of deficiency upon the taxpayer and he is prohibited from making an assessment of the deficiency until the expiration of the ninety days, within which taxpayer may commence a proceeding in the Tax Court "nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court *has become final*." Section 272(a)(1), italics supplied. Moreover, if the Tax Court upon redetermination finds a deficiency, the deficiency shall be assessed and paid upon notice and demand when the decision of the Tax Court "*has become final*." Section 272(b), italics supplied (Appendix, *infra*, p. 17). Again, Section 272(h) (Appendix, *infra*, pp. 17-18) specifically provides that "the date on which a decision of the Tax Court *becomes final* shall be determined according to the provisions of section 1140." (Italics supplied.)

deed, the Committee report, which recommended the adoption of the predecessor of Section 1140, as Section 1005 of the Revenue Act of 1926, c. 27, 44 Stat. 9, explained (S. Rep. No. 52, 69th Cong., 1st Sess., p. 37 (1939-1 Cum. Bull. (Part 2) 332, 360)):

> *Date on which decision becomes final.*—Section 1005 prescribes the date on which a decision of the Board (whether or not review thereof is had) is to become final. Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during review of the Commissioner's determination, commences to run upon the day upon which the Board's decision becomes final, it is of utmost importance that this time be specified as accurately as possible. In some instances in order to achieve this result the usual rules of law applicable in court procedure must be changed. For example, the power of the court of review to recall its mandate is made to expire 30 days from the date of issuance of the mandate.

In this case the April 8, 1954, decisions of the Tax Court were duly served by registered mail upon counsel in accordance with the settled Tax Court practice.[6]

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[6] See Internal Revenue Code, Section 1113 (Appendix, *infra*, p. 18).

Rules of Practice before the Tax Court (Rev. Nov. 1952):

Rule 22.—Service

* * * * *

(b) *Upon first counsel of record.*—Service upon any counsel of record will be deemed service upon the party, but, where there are more than one, service will be made only upon counsel for petitioner whose appearance was first entered of record—unless the first counsel of record, by writing filed with the Court, designates other counsel to receive service, in which event service will be so made.

It is not claimed that the failure of taxpayers to realize that their time to petition for review was running was due to any fault of the Tax Court or the Commissioner; in similar circumstances the finality required by Section 1140 has repeatedly been enforced. *Commissioner* v. *Realty Operators, supra; Swall* v. *Commissioner, supra; McCarty* v. *Commissioner, supra; Monjar* v. *Commissioner, supra.*

2. Although the opinion below criticizes that of the Sixth Circuit in *Reo Motors* v. *Commissioner*, 219 F. 2d 610 (Pet. App. 8a-9a), the decision here is not in conflict with that of the Sixth Circuit (see Pet. 5-7). Here there are present no extraordinary circumstances which might warrant the exercise of jurisdiction to grant relief in the nature of a writ of error *coram nobis*. In the *Reo* case there was a mutual mistake of fact in entering into a stipulation, upon which the Tax Court decision had been based, and the court noted (p. 612) that—

> The petitioner points out that the Commissioner not only concedes this factual error, but is seeking to take advantage of it to the detriment of the petioner in resisting petitioner's claim under § 722.

Here, however, the Commissioner was not at all at fault and was in no sense a party to the error or inadvertence. Indeed, all that the Tax Court here asserted as the grounds for exercise of power to grant "extraordinary relief" (R. 138) was to "enable the petitioner to present new and additional evidence" and to enable the court to reconsider the issue on the merits to determine whether it had made any erroneous findings or legal conclusions. These grounds are not comparable to the

conceded errors, which went to the regularity of the proceeding itself and to which the Commissioner allegedly had himself contributed, that were involved in the *Reo Motors* case. The showing made to the Tax Court here was not such as would justify even granting a new trial on the basis of newly discovered evidence—had the motion been timely—for the evidence offered was merely cumulative and was not such as by due diligence could not have been adduced at the original hearing. (R. 139-144.) As this Court held in *Wayne Gas Co.* v. *Owens Co.*, 300 U. S. 131, 137, "Where it appears that a rehearing has been granted only for that purpose [to extend the time for appeal], the appeal must be dismissed."[7]

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[7] See also *Commissioner* v. *Realty Operators*, *supra*, p. 289. This principle plainly applies here. Taxpayers' original motion was simply to vacate the decisions entered on April 8, 1954. (R. 94.) At the full hearing, which was held on this motion on September 14 and 16, 1954 (R. 106-133), there was no suggestion that a further hearing on the merits was necessary to enable taxpayers to present new and additional evidence; substantially all that was discussed were the circumstances under which the time to file petitions for review had been permitted to lapse. Indeed, it was not until October 11, 1954, that the suggestion first was made that the Tax Court should vacate the April decisions for the purpose of granting taxpayers a rehearing on the merits. If taxpayers believed that the justice of their cause required the taking of additional evidence on the merits, which was the nominal reason for vacating the decisions and for the rehearing, it is not explained why they waited for approximately six months after receiving the Tax Court's findings and opinion before even suggesting to the Tax Court the need for a rehearing; nor is it explained why in the original motion to vacate, and in the course of the discussion at the hearing on that motion, no relief by way of adducing additional evidence on the merits was applied for. Concededly, taxpayers at all times were aware of the Tax Court's findings and opinion and there was no requirement that taxpayers await the Tax Court's decisions before moving for rehearing, if in fact the alleged extraordinary need existed for adducing additional evidence. Indeed, the Tax Court's rules provided (Rule 19(e) (Rev. Nov., 1952)) that "No motion for rehearing,

Contrary to taxpayers' contention (Pet. 7-8), the decision below does not conflict with that of the Fifth Circuit in *LaFloridienne J. Buttgenbach & Co.* v. *Commissioner*, 63 F. 2d 630. As the opinion below points out, the *Buttgenbach* case is readily distinguishable on its facts. (Pet. App. 9a.) The order of the Board of Tax Appeals there vacated was based on a stipulation and the Board itself had never ascertained what if any taxes were owed. Both parties agreed to set aside the stipulation, and the Fifth Circuit ruled only that a redetermination based on a stipulation could be vacated at the instance of the parties to the stipulation. It may be added that the *Buttgenbach* case has been questioned or distinguished by the First Circuit in the *Sweet* case, *supra*, p. 81, the Second Circuit in the *Monjar* case, *supra*, p. 265, and the Third Circuit in the case of *White's Will*, *supra*, pp. 748, 749. Moreover in the *Swall* case, p. 325, the Ninth Circuit considered that the *Buttgenbach* case was in effect overruled by *Helvering* v. *Northern Coal Co.*, 293 U. S. 191.

Finally, the decision of the Third Circuit in *Stern* v. *Commissioner*, 215 F. 2d 701, is not, as taxpayers contend (Pet. 8-10), in conflict with the decision below "on the question of whether the Tax Court is a judicial tribunal." The holding there was merely that the Tax Court should follow accepted forms of judicial procedure by indicating in some appropriate way on its

---

further hearing, or reconsideration may, except by special leave, be filed more than 30 days after the *opinion* has been served * * *." (Italics supplied.) Moreover, the record shows that at the conference of April 14, 1954, attended by taxpayer Jesse Lasky and his attorneys, there was no suggestion of a need, extraordinary or otherwise, to adduce additional evidence. (R. 96, 99, 101-102, 103-104.)

record in each case reviewed by the full court the names of the judges who participated in the decision. But, as already pointed out, pp. 10-12, *supra*, there is no question here as to whether the Tax Court is or is not a judicial tribunal. This case calls for no inquiry into such broad questions as whether the Tax Court is "a judicial tribunal," or whether it exercises "inherently judicial functions".

CONCLUSION

The decision of the court below is correct, and there is no conflict of decisions. The petition for certiorari should be denied.

Respectfully submitted,

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OCTOBER, 1956.

APPENDIX

Internal Revenue Code of 1939:

SEC. 272. PROCEDURE IN GENERAL.

* * * * *

(b) [8] *Collection of Deficiency Found by the Tax Court.* [9]—If the taxpayer files a petition with the Tax Court, the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Tax Court which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

* * * * *

(h) [10] *Final Decisions of the Tax Court.*—For

---

[8] Internal Revenue Code of 1954, Section 6215(a) (26 U.S.C., 1952 ed., Supp. II, Sec. 6215), is substantially identical.

[9] Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 504. CHANGE OF NAME OF BOARD OF TAX APPEALS.

* * * * *

(c) *References.*—All references in any statute (except this section), or in any rule, regulation, or order, to the "Board of Tax Appeals" or to the "Board" when used in the sense of "Board of Tax Appeals", or to the "member", "members", or "chairman" thereof shall be considered to be made to The Tax Court of the United States, the judge, judges, and presiding judge thereof, respectively.

[10] Internal Revenue Code of 1954, Section 6214(c) reads as follows:

Final Decisions of Tax Court.—For purposes of this chapter and subtitles A or B the date on which a decision of the Tax Court becomes final shall be determined according to the provisions of section 7481.

(26 U.S.C., 1952 ed., Supp. II, Sec. 6214(c).)

the purposes of this chapter the date on which a decision of the Tax Court becomes final shall be determined according to the provisions of section 1140.

* * * * *

26 U.S.C., 1952 ed., Sec. 272.)

SEC. 1100[11] [As amended by Sec. 504(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. STATUS.

The Board of Tax Appeals (hereinafter referred to as the "Board") shall be continued as an independent agency in the Executive Branch of the Government. The Board shall be known as The Tax Court of the United States and the members thereof shall be known as the presiding judge and the judges of The Tax Court of the United States.

(26 U.S.C., 1952 ed., Sec. 100.)

* * * * *

SEC. 1113.[12] SERVICE OF PROCESS.

The mailing by registered mail of any pleading, decision, order, notice, or process in respect of proceedings before the Tax Court shall be held sufficient service of such pleading, decision, order, notice, or process.

(26 U.S.C., 1952 ed., Sec. 1113.)

SEC. 1117.[13] REPORTS AND DECISIONS.

(a) *Requirement.*—A report upon any proceeding instituted before the Tax Court and a decision thereon shall be made as quickly as practicable.

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[11] Internal Revenue Code of 1954, Section 7441 (26 U.S.C., 1952 ed., Supp. II, Sec. 7441), is substantially identical.

[12] Internal Revenue Code of 1954, Section 7455 (26 U.S.C., 1952 ed., Supp. II, Sec. 7455), is substantially identical.

[13] Internal Revenue Code of 1954, Section 7459(a), (b) and (c) (26 U.S.C., 1952 ed., Supp. II, Sec. 7459), is substantially identical.

The decision shall be made by a member in accordance with the report of the Tax Court, and such decision so made shall, when entered, be the decision of the Tax Court.

(b) *Inclusion of Findings of Fact or Opinions in Report.*—It shall be the duty of the Tax Court and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Tax Court shall report in writing all its findings of fact, opinions and memorandum opinions.

(c) *Date of Decision.*—A decision of the Tax Court (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Tax Court. If the Tax Court dismisses a proceeding for reasons other than lack of jurisdiction and is unable from the record to determine the amount of the deficiency determined by the Commissioner, or if the Tax Court dismisses a proceeding for lack of jurisdiction, an order to that effect shall be entered in the records of the Tax Court, and the decision of the Tax Court shall be held to be rendered upon the date of such entry.

* * * * *

(26 U.S.C., 1952 ed., Sec. 1117.)

SEC. 1140. DATE WHEN TAX COURT DECISION BECOMES FINAL.

The decision of the Tax Court shall become final—

(a) [14] *Petition for Review Not Filed on Time.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; * * *

* * * * *

(26 U.S.C., 1952 ed., Sec. 1140.)

* * * * *

SEC. 1142. PETITION FOR REVIEW.

The decision of the Tax Court rendered after February 26, 1926 (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318 of the Revenue Act of 1926, 44 Stat. 65, 83, relating to hearings before the Tax Court prior to February 26, 1926) may be reviewed by a Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered, or, in the case of a decision rendered on or before June 6, 1932, within six months after the decision is rendered.

(26 U.S.C., 1952 ed., Sec. 1142.)

Internal Revenue Code of 1954:

SEC. 7483. PETITION FOR REVIEW.

The decision of the Tax Court may be reviewed by a United States Court of Appeals as provided in section 7482 if a petition for such review is filed by either the Secretary (or his delegate) or the

[14] Internal Revenue Code of 1954, Section 7481(1) (26 U.S.C., 1952 ed., Supp. II, Sec. 7481), is substantially identical.

taxpayer within 3 months after the decision is rendered. If, however, a petition for such review is so filed by one party to the proceeding, a petition for review of the decision of the Tax Court may be filed by any other party to the proceeding within 4 months after such decision is rendered.

(26 U.S.C., 1952 ed., Supp. II, Sec. 7483.)

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No. 371

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

BESSIE LASKY AND JESSE L. LASKY, *Petitioners*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

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October 9, 1956

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITIONERS' REPLY BRIEF

I.

The Government's Brief in Opposition cites certain decisions of this Court which it says sustain the Ninth Circuit. Such is not the fact.

In *R. Simpson, Inc.* v. *Commissioner,* (1944) 321 U. S. 225, (B. 10) the question involved was the power

of the Supreme Court to grant a rehearing of the denial of certiorari in a tax case. The question arose because Section 1140 of the Internal Revenue Code, (the same Section involved in the case at bar) says a Tax Court decision becomes final under certain conditions, including:

> "Upon the denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; * * * "

In the *Simpson* case, this Court said that a decision of the Tax Court did not become "final" upon denial of a petition for certiorari and that this Court could grant a rehearing of the denial of certiorari provided the petition for rehearing was filed within 25 days after the denial. In other words, despite the specific wording of Section 1140, this Court held that it has the power to grant a rehearing of a petition for certiorari previously denied. The decision is obviously correct and the Government so agreed. The opinion states: (p. 230)

> "The Government after consideration of the practical aspects of the question advises that in its view our practice in these matters has been 'salutary and in accordance with sound policy'."

It is our position that the *Simpson* case establishes the rule that the word "final" does not deprive courts in tax cases of the usual discretionary powers that judicial tribunals possess. The established rule is that a court has inherent power to relieve a party from a "final" judgment because of mistake, inadvertency, surprise or excusable neglect. This basic rule is now

expressed by Rule 60(b), Federal Rules of Civil Procedure, which states in part:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * * (6) any other reasons justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. * * * Writs of coram nobis, coram vobis, audita querela and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

While we do not contend that the Tax Court is bound by the Rules of Civil Procedure, we do contend that the Tax Court performs purely judicial functions. That being true, it has the inherent powers of any judicial tribunal to control, amend, open and vacate its decisions to accomplish justice.

As the Brief in Opposition states, Lasky has been deprived of his right of appeal due to oversight of counsel and through no fault of his. As a result, all his property, including his home, is tied up by tax liens. He does not have sufficient property to pay the tax claim. His case is meritorious. Justice demands that he be given the right to prosecute his appeal before he is stripped of all his worldly goods. This Court should grant the writ and liberally interpret the statute, as it did in the *Simpson* case.

In *Helvering* v. *Northern Coal Co.,* (1933) 293 U. S. 191, (B. 10) this Court had previously affirmed the Courts of Appeals on the merits by an equally divided Court. Nearly six months after the mandates issued, petitions for rehearing were filed. This Court held that it could not grant a re-hearing more than 30 days after the date of issuance of the mandates because of the statutory provision which reads that a Board of Tax Appeals' decision becomes final:

> "Upon the expiration of 30 days from the date of the issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed."

It is obvious that the later *Simpson* case greatly modified the earlier interpretation of Section 1140 in the *Northern Coal Co.* case in order to reach a result which "enables us to do justice to the party if he appears to have the right of the controversy * * *." It is utterly impossible to reconcile the *Northern Coal Company* case with the later *Simpson* case and the case at bar. This emphasizes the necessity for granting the writ and settling the law.

Old Colony Trust Co. v. *Commissioner,* (1929) 279 U. S. 716, (B. 10) did not consider the question here involved. It held that appeals from the Board of Tax Appeals (now the Tax Court) to the Courts of Appeals involve a "case or controversy", so could properly be heard by Courts of Appeals in exercising their judicial function. This Court knew from consideration of *Blair* v. *Oesterlein Machinery Co.,* (1927) 275 U. S. 220, that the Board of Tax Appeals exercised powers "which are judicial in character." (p. 227)

The Government also argues in paragraph 1 (B. 11) that there is some peculiar necessity in Tax Court

cases to know when a decision is final. This position is not realistic. Assessments, credits, abatements and refunds of taxes are routine matters. For example, in the case of jeopardy assessments the assessment is made and often tax is collected. If the case is later settled, or decided by the Tax Court, the Commissioner may have to make credits, abatements or refunds. Likewise, if a taxpayer appeals a Tax Court decision and elects to pay the tax rather than give bond, he receives a refund under Section 1146, Internal Revenue Code, if the Tax Court is reversed. In other words, assessment and collection of a tax is not necessarily the final step before tax liability is determined.

There is less need for finality in tax cases than in bankruptcy cases because, in tax cases, the rights of third parties are not involved. This Court found no difficulty in a bankruptcy case to disregard the thirty-day limit on appeals where such action was necessary to do justice and grant the right of appeal. *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.,* (1937) 300 U. S. 131.

II.

The Government contends that *Reo Motors Inc.* v. *Commissioner,* 219 F. (2d) 610, (Pet. 5-7) and *Buttgenbach* v. *Commissioner,* 63 F. (2d) 630 (Pet. 7-8) are not in conflict with the case at bar because, in the *Reo* case, there was a mutual mistake of fact and, in the *Buttgenbach* case, the parties stipulated that the decision be vacated after it became "final." This argument does not answer the basic question of the power of the Tax Court to vacate its decisions after they have become "final." We submit that the Tax Court either has that power, or it does not have that

power. Certainly, the parties to litigation cannot confer jurisdiction upon the Tax Court, or any other judicial tribunal, by stipulating that it has jurisdiction.

Despite the effort to here distinguish the *Reo Motors* case, the Government in its brief in the Sixth Circuit in that case made substantially the same argument and cited substantially the same cases as it is here citing. It argued that "Since the finality of a Tax Court decision deprives the Tax Court of *jurisdiction* to alter its decision, the decision must stand regardless of the basis for requested relief therefrom." Having lost the *Reo* case, the Government now says the *Reo* case is not in conflict with the case at bar on the question of jurisdiction because there is a different factual basis for the action of the Sixth Circuit. However, it cannot be denied that the *Reo* case holds that the Tax Court has the power to vacate "final" decisions and the case at bar holds the Tax Court lacks such power. In the Ninth Circuit, in the case at bar, the Government argued that the *Reo* case was not correctly decided.

III.

The Brief in Opposition makes no comment on the petitioners' contention (Pet. 13) that the question presented involves an important question of Federal law which has not been, but which should be, settled by the Supreme Court. It is significant that "Taxes, The Tax Magazine" for October, 1956, concludes its comment on the *Lasky* case by stating "Lawyers will look to the Supreme Court's decision because of its potential effect on the practice of tax law." The entire comment is:

> "Like Lazarus, the question as to whether the Tax Court is in truth a court or just an administra-

tive agency comes to life. Its recent resurrection is in *Lasky* v. *Commissioner*. In addition to its importance to the taxpayer who has almost $250,000 at stake, the case is important to the question: What is the Tax Court—animal, vegetable or mineral? Mr. Lasky owned quite a piece of a movie, *Sergeant York*. He went to the Tax Court claiming that the money he received was capital gain but that it was stamped ordinary income.

"Now to the other issue—a decision of the Tax Court becomes final three months after it is rendered. More than three months after the decision in the *Lasky* case, the Tax Court was asked to vacate its earlier decision on the ground of excusable neglect—a power which is confined to United States district courts and not applicable to executive agencies. Here's what the Ninth Circuit said about the Tax Court's action as it held that the Tax Court was without jurisdiction to set aside its first decision:

> " 'Though not a court at all but merely an administrative agency it assumed the power of a district court and in December, 1954, it granted petitioners' motions to vacate its decision of April 8, 1954, and for the taking of additional evidence. After additional evidence was taken, the Tax Court rendered a second decision reaching the same result as in the first. The petition for review of the second decision was filed well within three months of the date it was entered.'

"Now the First, Second, Third and Ninth Circuits hold that the Tax Court is not a court. The Sixth Circuit says it is. Now the issue is in the black-robed lap of the Supreme Court. Ironically, the government contends that the Tax Court is not a court and that it is the taxpayer who is contending that it is. There are some knotty problems of

administrative law involved in this question. Lawyers will look for the Supreme Court's decision because of its potential effect on the practice of tax law."

While the foregoing quotation is not in all respects accurate, it does show that an outstanding magazine devoted to taxes believes the question is important.

Respectfully submitted,

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October 9, 1956

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 235 F. (2d) 97, and appears in the record at page 476.

The Findings of Fact and Opinion of the Tax Court are reported in 22 T.C. 13 (R. 62-92).

The order of the Tax Court granting a rehearing herein (R. 135) and the orders and decisions of the

Tax Court and memoranda sur orders and decisions (R. 138-145) are not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 13, 1956. The petition for a writ of certiorari was filed August 31, 1956, and was granted November 5, 1956. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

QUESTION PRESENTED

On December 13, 1954, the Tax Court entered an order vacating and setting aside its decisions of April 8, 1954, and granted a further hearing on the merits, because:

> "The Court concluded that there existed extraordinary circumstances and good cause for granting extraordinary relief, namely, (1) further hearing on the merits to enable the petitioner to present new and additional evidence; and (2) reconsideration by the Court of the issue presented to determine whether the Court made any erroneous conclusion of fact or law in its original findings of fact and conclusions of law." (R. 138)

The further hearing on the merits was held on January 21 and January 26, 1955.

The question for decision is:

Did the Tax Court have the discretionary power to enter its order of December 13, 1954, vacating and setting aside its decisions of April 8, 1954, and granting petitioners a rehearing on the merits, or did § 1140 (a) Internal Revenue Code of 1939, which provides that Tax Court decisions become "final" if no appeal is filed within three months, deprive the Tax Court of such discretionary power?

STATUTES INVOLVED

The statutory provisions involved are Sections 272, 1100, 1113, 1117, 1140 and 1142 of the Internal Revenue Code of 1939 and Sections 7422 and 7483 of the Internal Revenue Code of 1954. They are printed in the Appendix hereto, pages 44 to 48.

STATEMENT

The basic facts presenting the issue in this case are that on April 8, 1954, the Tax Court entered its findings of fact and opinion in the case. On the same day, it entered separate decisions determining the tax liability of each petitioner. Due to a misfiling of the decisions in the office of petitioners' attorneys, neither the attorneys nor the petitioners were aware that the decisions had been entered until the three month period for appeal had expired. Thereafter, present counsel promptly investigated the situation and concluded there were meritorious grounds for a rehearing. Accordingly, appropriate motions were filed, hearings held thereon, and a rehearing granted for good cause. After the rehearing, the Tax Court reaffirmed the conclusion reached after the first trial. Petitioners appealed to the Ninth Circuit which dismissed the appeal on the ground that the Tax Court did not have the power to grant the rehearing because it was "not a court at all but merely an administrative agency" which "assumed the power of a district court." (R. 477)

In more detail, the facts are:

On March 23, 1940, Jesse L. Lasky acquired from Sgt. Alvin C. York the exclusive motion picture, radio, literary and dramatic rights to the life story of York. (R. 20, 23) Thereafter, on May 15, 1940, Lasky conveyed all his rights, title and interest under the contract

of March 23, 1940, with York, to Warner Bros. Pictures, Inc. In consideration for all his rights, title and interest under the contract of March 23, 1940, Warner Bros. agreed to pay Lasky $40,000, plus a certain percentage of the gross film rentals or sales realized from the distribution of the photoplay. (R. 38, 41) In addition, by a separate and distinct contract of May 8, 1940, Warner Bros. employed Lasky as a co-producer for the purpose of producing the play based upon the life of Sgt. York. (R. 385)

After the picture "Sergeant York" was released, a dispute arose and dissatisfaction existed between Lasky and Warner Bros. Lasky was dissatisfied with the way Warner Bros. was distributing the picture. (R. 169, 241, 275, 277, 314, 345) He was also dissatisfied with the receipts that were tendered him from the distribution of the picture. After consulting his attorney, certain checks tendered to Lasky by Warner Bros. as his share of the film rentals were returned to Warner Bros. (R. 77, 241, 278, 315, 351) At that time, it was contemplated that an accounting of the distribution by Warner Bros. would be demanded by Lasky. However, Lasky wished to avoid a break with Warner Bros. because he was in their employ as a producer and wanted to remain in their employ in that capacity. He had started a new contract with Warner Bros. and was anxious to produce the "Adventures of Mark Twain" for them. (R. 349-350) Accordingly, Lasky decided to sell his rights under the contracts of May 15, 1940 and, on December 4, 1942, he sold them to United Artists Corporation for $805,000. (R. 80, 254, 281, 286, 322, 330, 350, 353) Later, United Artists Corporation sold the contract to Warner Bros. for $820,000. When United Artists Corporation purchased the contract, it was a bona fide purchase and

there was no understanding that the contract would be resold to Warner Bros. (R. 305, 351)

Bessie Lasky and Jesse L. Lasky each reported $402,500 as long term capital gain on his or her income tax return filed for 1942. (R. 22)

On November 28, 1949, the Commissioner of Internal Revenue sent petitioners, by registered mail, notices of deficiency, in which he determined that the gain on the sale was ordinary income. As a result, the Commissioner determined that the petitioner, Bessie Lasky, owed a deficiency in income tax for the taxable year 1943 in the amount of $224,722.55; and that the petitioner, Jesse L. Lasky, owed a deficiency in income tax for the taxable year 1943 in the amount of $224,515.44. (R. 10, 14, 62)

On January 9, 1950, petitioners duly filed appeals from said determination with the Tax Court of the United States. (R. 7-14) The case was tried before the Tax Court on December 10 and 11, 1951, in Los Angeles, California. On April 8, 1954, the Tax Court promulgated its findings of fact and opinion (R. 62-92) and entered its decisions ordering and deciding that the taxpayers owed the deficiencies in income tax for the taxable year 1943 in the amounts determined by the Commissioner of Internal Revenue. (R. 92, 93)

After the receipt of the Findings of Fact and Opinion by petitioners' counsel, a conference, attended by Lasky and counsel, was held. At that conference, the possibility of having the decisions reversed on appeal and other matters were discussed (R. 101, 102). At the conference, Lasky was advised that the decisions had not been received and that he would have three months from the date of the decisions within which

to file an appeal. On or about July 26, 1954, or on or about August 2, 1954,[1] counsel for Lasky for the first time discovered that copies of the decisions of April 8, 1954, had been received but had been misfiled and placed in the correspondence side of counsel's file in the Lasky case, without being called to counsel's attention. On the same day, counsel telephoned Lasky and advised him that, in going through his file, he had found the decisions and that they were dated April 8, 1954. (R. 95, 100, 101, 103) Upon receipt of this information, Mr. Lasky asked that the decisions be sent to him. This was done under date of August 5, 1954 (R. 97)

On August 24, 1954, present counsel for petitioners filed with the Tax Court a motion for leave to file a motion to vacate decisions out of time (R. 93) and a motion to vacate decisions. The said motion to vacate decisions did not state any facts other than, "A statement of facts and supporting affidavits in support of this motion will be filed in the near future." (R. 94) On September 10, 1954, four affidavits in support of motion were filed. (R. 95) On October 11, 1954, a statement of facts in support of motion to vacate decisions and for rehearing was filed. (R. 484)

The motion for leave to file motion to vacate decisions out of time was granted August 26, 1954. (R. 94)

Thereafter, on September 14, 1954 (R. 106) and September 16, 1954, the Tax Court held hearings on the motion to vacate decisions. (R. 122)

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[1] Mr. Lasky's and Mr. Rogers' affidavits (R. 96-100) state the date as August 2, 1954. Mr. Green's and Mr. Harkins' affidavits (R. 102-105) state the date as July 26, 1954. Counsel's letter transmitting the decisions to Mr. Lasky is dated August 5, 1954 (R. 98).

On October 11, 1954, petitioners lodged with the Tax Court a motion for leave to file an amendment to the motion to vacate decisions out of time and an amendment to the motion to vacate decisions. The motion was granted October 15, 1954. (R. 133, 134) The motion, as amended, read:

> "Come now the above-named petitioners by their attorney, Robert Ash, and move the Court vacate the decisions entered herein on April 8, 1954, for the purpose of granting petitioners a rehearing of the case on its merits.
>
> "The statement of facts and supporting affidavits in support of this motion are incorporated herein by reference." (R. 134)

The statement of facts represented that if the rehearing were granted, the petitioners would show the decision of the Tax Court was wrong on its merits. In detail it was represented: (R. 485)

> "(a) That the agreement of May 15, 1940, and the supplemental agreement of May 15, 1940, by which the petitioner sold to Warner Brothers all his rights to the Sergeant York Story and Warner Brothers agreed to pay petitioner a part of the gross receipts in varying percentages from the distribution of the photoplay are entirely separate and distinct from the employment contract between petitioner and Warner Brothers dated May 8, 1940.
>
> "(b) The evidence would show in detail that a bona fide dispute existed in 1942 between petitioner and Warner Brothers. Additional witnesses would be produced to establish this important fact.
>
> "(c) Evidence would be produced to show that the sale by petitioners on December 4, 1942, to United Artists Corporation was a bona fide sale

to a third party with no understanding that United Artists Corporation would resell to Warner Brothers. This evidence would show conclusively that United Artists Corporation was not a mere intermediary in the transaction.

"(d) The evidence would show in detail the business purpose behind petitioner's sale to United Artists Corporation on December 4, 1942.

"(e) Upon receipt of this additional evidence at a rehearing it is petitioner's opinion that the Court will revise its opinion in accordance with the newly-presented facts and hold that the sale by the petitioners of their property rights to United Artists Corporation on December 4, 1942, was a bona fide sale of a capital asset within the provisions of Section 117 of the Internal Revenue Code and that the transaction had been properly reported in their 1942 Federal Income Tax Return. Consequently, the decisions on the rehearing would be that there was no deficiency in tax due from the petitioners for the taxable year 1943."

On December 13, 1954, the Tax Court entered an order vacating and setting aside the decisions of April 8, 1954, and granting the petitioners a further hearing on the merits. (R. 135) The Tax Court stated its reasons for granting the rehearing as follows:

"The Court concluded that there existed extraordinary circumstances and good cause for granting extraordinary relief, namely, (1) further hearing on the merits to enable the petitioner to present new and additional evidence; and (2) reconsideration by the Court of the issue presented to determine whether the Court made any erroneous conclusion of fact or law in its original Findings of Fact and conclusions of law. * * * " (R. 138)

Thereafter, a rehearing of the case on the merits was held in Washington, D. C. on January 21 and January

26, 1955. (R. 300-385) At the rehearing, the testimony of the accountant for the petitioners was taken for the first time. (R. 308-335) Also received for the first time was the testimony of Gradwell Sears who was, in 1942, the executive vice-president of United Artists, in charge of world-wide distribution of pictures, who had been, prior to October, 1941, president of a subsidiary of Warner Bros. which distributed Warner Bros.' pictures. He had been the distributor of the picture "Sergeant York" for Warner Bros. (R. 301-308) The testimony of the president of United Artists in 1942 was also taken for the first time. (R. 356-374) Additional testimony of Jesse L. Lasky was received. (R. 335-354) On June 30, 1955, the Tax Court in the case of each petitioner entered (a) memorandum sur order and decision and (b) an order and decision again ordering and deciding upon the rehearing and reconsideration of the case on the merits that there were deficiencies in income tax for the taxable year 1943 as determined by the Commissioner of Internal Revenue. (R. 138-145)

Petitions for review were filed in the Court of Appeals on August 10, 1955, to review the orders and decisions entered by the Tax Court on June 30, 1955. (R. 145)

The Court of Appeals dismissed the appeal on the ground that the Tax Court was without jurisdiction to set aside its decision of April 8, 1954. (R. 476-481)

The petition for writ of certiorari was filed August 31, 1956, and was granted November 5, 1956. (R. 486)

SUMMARY OF ARGUMENT

The problem in this case is a broad one and involves the determination of the status in our judicial system of the Tax Court of the United States. The argument is directed, first, to the discretionary power of the Tax Court to vacate its decisions out of time and, second, to a discussion of the background, origin and functions of the Tax Court. Knowledge of the latter is essential in order to decide the problem presented by the case.

The Court of Appeals below held the Tax Court is "not a court at all, but merely an administrative agency" which had "assumed the power of a district court." The Sixth Circuit, when presented with the same question, held the Tax Court is not an administrative agency but "is a court exercising inherently judicial functions and having the necessary judicial powers to carry out such functions." *Reo Motors, Inc.* v. *Commissioner,* (C.A. 6, 1955) 219 F. (2d) 610. The *Reo Motors* opinion cites many cases in support of its position. The Fifth Circuit, likewise, has directed the Board of Tax Appeals (now the Tax Court) to vacate a decision entered more than three years prior thereto. *Buttgenbach* v. *Commissioner,* (1933) 63 F. (2d) 630.

The Third Circuit points out that, although the Internal Revenue Code designates the Tax Court as "an independent agency in the Executive Branch of the Government", this is "merely a matter of legal semantics since, whatever it may be called, it is an 'independent' judicial agency." *Stern* v. *Commissioner,* (1954), 215 F. (2d) 701. The Third Circuit supports this conclusion with numerous citations.

Congress, admittedly, has provided that the Tax Court shall have the powers and procedures of a court. These characteristics and powers are not taken away because "for convenience of housekeeping"[2] the Tax Court is placed in the Executive Branch of the Government.

This Court and the Courts of Appeals have recognized that the Tax Court has the inherent powers of a Court in many important situations. These include:

(a) The power to apply the doctrine of res judicata, collateral estoppel, or estoppel by judgment.

(b) The power to pass upon the constitutionality of taxing statutes and to hold such statutes unconstitutional.

(c) The power to declare Treasury Regulations invalid.

(d) The power, concurrent with District Courts, in bankruptcy cases, to determine the bankrupt's tax liability.

If these inherent powers of a court are at this late date held inapplicable because the Tax Court "is not a court at all", the precedents will become valueless and chaos in the administration of the tax laws can result.

Although the Internal Revenue Code says that a Tax Court decision becomes final upon the denial of a petition for certiorari, this Court has held that the literal language of the statute must give way to accepted court practice. *R. Simpson & Co., Inc.* v. *Commissioner,* (1944) 321 U. S. 225.

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[2] Stern v. Commissioner (CA 3, 1954), 215 F. (2d) 701.

It is our position that the *Simpson* case establishes that the word "final" does not deprive courts in tax cases of the usual discretionary powers which judicial tribunals possess. Courts have the inherent power to relieve a party from a "final" judgment. This basic power is now expressed in Rule 60 (b), Federal Rules of Civil Procedure.

The Court below laid much stress upon *Helvering* v. *Northern Coal Co.*, (1934), 293 U. S. 191. We feel that the later case of *R. Simpson & Co., Inc.*, (1944) 321 U. S. 225, greatly modified the *Northern Coal Co.* case to establish a rule which "enables us to do justice to the party if he appears to have the right of the controversy."

There is no greater need for finality in tax cases, where third parties are not involved, than in bankruptcy cases where the rights of third parties are involved. This Court has held that a bankruptcy court may set aside an order dismissing a petition and rehear the cause after the time for appeal has expired. *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, (1937) 300 U. S. 131.

The mere fact that Section 1140 Internal Revenue Code states when a decision of the Tax Court shall become final can have no unique significance on the power of the Tax Court over its decisions or judgments. There comes a time when the judgment or decision of all courts becomes final so as to preclude an appeal. For instance, a judgment or order of a District Court becomes final 30 days after its entry, unless motions are made subsequent to its entry which terminate the running of the time for appeal. See Rule 73 (a), Federal Rules of Civil Procedure. However, the inherent power of the District Court to vacate its

judgment after time for appeal has elapsed cannot be doubted.

Some of the decisions cited by the Court below indicate some peculiar necessity in Tax Court cases to know when a decision is "final." This position is not realistic. Assessments, credits, abatements and refunds of taxes are being made all the time. Such is accepted administrative procedure.

A District Court in a tax refund suit would have the power to vacate its judgment under the state of facts which exist in the case at bar. Consequently, it can be seen that from an administrative viewpoint the fact that a "final" decision might be reopened or vacated does not create burdensome uncertainty. That is particularly true because the rights of third parties are not involved.

The decisions interpreting § 1140 show that the section does not mean that in all situations the decision becomes "final" three months from the entry of decision if no petition for review is filed. It has long been held that if a petition for rehearing is seasonably presented, the time limited for appeal does not begin to run until the petition is disposed of. This is consistent with the interpretation of other statutes.

The granting of the rehearing in this case was discretionary with the Tax Court. Petitioners were before the Tax Court, not as a matter of right, but by special leave of the Court. The Tax Court properly exercised its discretion in vacating the decisions and granting a further hearing on the merits.

It is necessary to understand the legislative and judicial background, origin and functions of the Tax Court.

Prior to 1924, taxes were summarily collected. If the Government asserted a tax, the taxpayer had no alternative but to pay, file a claim for refund and, if the claim was rejected or not acted upon within a certain period, sue for recovery. To remedy this unsatisfactory situation, the Secretary of the Treasury recommended the establishment of an informal Board of Tax Appeals to settle tax controversies. Provision for such an informal Board was included in the Revenue Bill of 1924, reported by the Ways and Means Committee and passed the House. It was likewise reported by the Finance Committee.

The entire character of the Board was changed by an amendment made and adopted on the floor of the Senate. As amended, the bill provided for a judicial tribunal "in all its essentials practically a court of record." The amendment was accepted by the conference and became part of the Revenue Act of 1924. The Board had no duties, purposes, or functions which were not judicial. However, its decisions were not final and either party could, after decision by the Board, litigate the case *de novo*.

In deciding *Williamsport Wire Rope Co.* v. *United States*, (1928), 277 U. S. 551, this Court obviously had not been informed of the legislative history outlined above because the Court relied upon and cited the Committee reports.

The Revenue Act of 1926 provided that decisions of the Board of Tax Appeals would be final and reviewable only by Courts of Appeals. The legislative history

of the 1926 Act shows that Congress intended to create a judicial, rather than an administrative tribunal. The 1926 Act, for all practical purposes, gave the Board concurrent jurisdiction with District Courts and the Court of Claims in tax cases. Its jurisdiction was increased so that it had the power to determine the correct tax liability. It could increase the deficiency asserted by the Commissioner, or determine that a refund was due the taxpayer.

When the Revenue Bill of 1928 was before Congress, the Ways and Means Committee recommended that the bill remedy the rule of *Chicago Railway Equipment Co.* v. *Blair*, (C.A. 7, 1927), 20 F. (2d) 10, which had treated the Board as an investigative body. The Finance Committee was of the opinion that the existing law clearly contemplated judicial and not administrative proceedings by the Board, so could see no need for further legislation on the subject.

The Revenue Act of 1942 changed the name of the Board to The Tax Court of the United States and the titles of members thereof to Judges. In 1948, Congress enacted a law providing that Courts of Appeals shall have exclusive jurisdiction to review decisions of the Tax Court "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury."

The provisions of the Internal Revenue Code of 1954 dealing with the Tax Court are in Chapter 76 "Judicial Proceedings."

ARGUMENT

The problem in this case is a broad one and involves the determination of the status in our judicial system of the Tax Court of the United States. The immediate

question is directed to the power of the Tax Court, in its discretion, to vacate and set aside a decision or judgment after the three-month period for appeal to a Court of Appeals has expired. To express it another way: Does the Tax Court, like other courts, have the inherent power to control, amend, open and vacate its decisions to accomplish justice in accordance with the modern trend? In order to decide this question, it is necessary to understand the background, origin and functions of the Tax Court.

Consequently, this argument will be directed first to the immediate problem as developed by the case law and, second, to a discussion, beginning at page 32, hereof, of the legislative and judicial history of the Tax Court and its predecessor, the Board of Tax Appeals.

The Court of Appeals below in the case at bar held that the Tax Court is "not a court at all, but merely an administrative agency" which had "assumed the power of a district court." Proceeding on this premise, the Ninth Circuit concluded the Tax Court did not have the power to grant the rehearing. This result is in direct conflict with decisions of other courts of appeals which hold that the Tax Court is not an administrative agency, but "is a court exercising inherently judicial functions and having the necessary judicial powers to carry out such functions." The quoted statement is from *Reo Motors, Inc.* v. *Commissioner,* (C.A. 6, 1955) 219 F. (2d) 610.

In the *Reo* case, after this Court had determined the excess profits tax liability of Reo Motors, Inc. for 1941, (338 U.S. 442) and the decision became "final", the taxpayer asked leave to file a motion asking the Tax Court to vacate its decision. The reason was that

the stipulation of facts upon which the Tax Court originally decided the case and was affirmed by this Court, contained a mutual mistake of fact which resulted in an omission from invested capital of over two million dollars. The Tax Court denied the motion for leave to file the motion to vacate the decision.

Upon appeal, the Sixth Circuit reversed the Tax Court, stating:

> "We are of the opinion that the Tax Court should have granted petitioner leave to file its substantive motion. Although the Tax Court is not, technically, a federal court, there has been a consistent and growing recognition that, as a practical matter, it is a court exercising inherently judicial functions and having the necessary judicial powers to carry out such functions. See e.g. *Goldsmith* v. *United States Board of Tax Appeals,* 270 U. S. 117 (1926); (5 AFTR 5842); *Stern* v. *Commissioner,* 215 F. (2d) 701, 706 (3 Cir. 1954). It would appear to follow that the Tax Court has power in extraordinary circumstances to vacate and correct its decision even after it has become final, similar to the jurisdiction of a court to grant a writ of error *coram nobis.* Cf. *United States* v. *Morgan,* 346 U. S. 502 (1954); *United States* v. *Mayer,* 235 U. S. 55 (1914); Rule 60 (b), Federal Rules of Civil Procedure.
>
> "This jurisdiction was recognized by the Court of Appeals for the Fifth Circuit in *La Floridienne J. Buttgenbach & Co.* v. *Commissioner of Internal Revenue,* 63 F. (2d) 630 (1933), (12 AFTR 257); and very recently by the Tax Court itself in *Bessie Lasky, Jesse L. Lasky* v. *Commissioner,* Tax Court Dockets Nos. 26,396 and 26,397 (1954)."

The only difference in the basic facts between the case at bar and the *Reo Motors* case is that, in the

Reo Motors case, the Tax Court refused to exercise its discretion and was required to do so by the Sixth Circuit. In the case at bar, the Tax Court did exercise its discretion and was reversed by the Ninth Circuit for having done so.[3]

The case at bar likewise is in direct conflict with *Buttgenbach* v. *Commissioner*, (C.A. 5, 1933) 63 F. (2d) 630.

In the *Buttgenbach* case, the taxpayer and the Commissioner in 1931 executed a joint petition asking the Board of Tax Appeals (now the Tax Court) to vacate and set aside an order entered in 1927 determining a tax liability. The Board of Tax Appeals denied the joint petition because of a supposed lack of power. The Fifth Circuit reversed on the ground that the Board had such power, stating:

> "Whether the Board be treated as a court or a departmental agency with quasi judicial functions, we are of opinion that it may in its discretion vacate such an order as this is, reinstating the matter for hearing before it on its merits or accepting a new stipulation touching the liability."

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[3] This factual distinction is correct although the Ninth Circuit in the case at bar states that, in the *Reo Motors* case, the Tax Court ordered the decision set aside. (R. 479)

[4] In other jurisdictional limitations cases, Courts of Appeals have disregarded the literal language of the statute. Sec. 272 (a) (1) 1939 Code provides that petitions must be filed with the Tax Court within 90 days from the date of the mailing of the notice of deficiency. In situations where the petitions were not actually filed within the 90 day period but in the ordinary course of the mail should have been received by the Tax Court within the 90 day period, Courts of Appeals have held that the petitions were timely

In support of the Ninth Circuit's opinion in the case at bar are the several cases cited in that opinion.

It is true that the Internal Revenue Code designates the Tax Court as "an independent agency in the Executive Branch of the Government". However, the Third Circuit, in *Stern* v. *Commissioner*, (1954) 215 F. (2d) 701, 706, points out this is "merely a matter of legal semantics since, whatever it may be called, it is an 'independent' judicial agency." The Court stated in the *Stern* case (p. 707):

> "But although Congress in the Internal Revenue Codes has continued to call the tribunal 'an independent agency in the Executive Branch of the Government' it has at the same time more realistically designated it as a court and its members as judges.[6] And it is the fact that from its inception as the Board of Tax Appeals in 1924 it has operated only as a judicial tribunal in adjudicating controversies as to tax liabilities arising between taxpayers and the Government.[7] Its powers are

[6] Act of October 21, 1942, § 504(a), 56 Stat. 957; Internal Revenue Code of 1954, § 7441.

[7] The jurisdiction which the Tax Court has exercised since 1942 under the Renegotiation Acts is likewise judicial in nature, involving controversies between government contractors and the Government as to whether profits received by such contractors are excessive when measured by the standards laid down in the Acts. Maguire Industries v. United States, 1949, 114 Ct. Cl. 687, 86 F. Supp. 905, cert. den. 340 U.S. 809.

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filed and the Tax Court had jurisdiction. *Arkansas Motor Coaches, Ltd., Inc.* v. *Commissioner*, (C.A. 8, 1952) 198 F. (2d) 189; *Central Paper Co.* v. *Commissioner*, (C.A. 6, 1952) 199 F. (2d) 902; *Detroit Automotive Products Co.* v. *Commissioner*, (C.A. 6, 1953) 203 F. (2d) 785.

wholly judicial in character.[8] It has never been given any administrative powers or functions nor has it ever had any investigatory, regulatory or policy-making duties or powers. Since the passage of the Revenue Act of 1926 its decisions have been final and reviewable only on the record by the United States courts of appeals.[9] Since 1948 the scope of that review has been the same as in the case of like decisions of the district courts.[10] The

[8] Blair v. Oesterlein Co., 1927, 275 U.S. 220, 227 [6 AFTR 7080]; Helvering v. Lazarus & Co., 1939, 308 U.S. 252, 255 [23 AFTR 778]; Uncasville Mfg. Co. v. Commissioner of Internal Revenue, 2 Cir. 1932, 55 F. 2d 893, 897 [10 AFTR 1208], cert. den. 286 U.S. 545, Commissioner of Internal Rev. v. Liberty Bank & Trust Co., 6 Cir. 1932, 59 F. 2d 320, 323 [11 AFTR 488]; Helvering v. Continental Oil Co., D.C. Cir. 1933, 68 F. 2d 750, 753 [13 AFTR 582], cert. den. 292 U.S. 627; Irwin v. Lawson, 5 Cir. 1938, 94 F. 2d 187, 190 [20 AFTR 674].

[9] In reporting to the House of Representatives the bill which became the Revenue Act of 1926 the Committee on Ways and Means said:

"In the view of the committee the decisions of the board are judicial and not legislative or administrative determinations. Review of judicial decisions may be had by direct appeal to the courts as well as by petitions to the courts for the enforcement of an administrative order, or by extraordinary remedy and suits for refunds. Further, no rehearing need be provided before the reviewing court, and the review of the decision of the board may be limited to the record made before the board. The imposition upon the court of the duty of reviewing judicial decisions, such as those of the board, is not the imposition of a nonjudicial duty . . ." House Report No. 1 on H.R. 1, 69th Cong., 1st Sess., p. 20.

[10] This was accomplished by section 36 of the Act of June 25, 1948, 62 Stat. 991, which amended section 1141(a) of the Internal Revenue Code of 1939 so as to make the decisions of the Tax Court reviewable by the courts of appeals "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." It is clear that by this action Congress intended (see Senate Report No. 1559 on H.R. 3214, 80th Cong., 2d Sess., pp. 2, 13) to repeal the rule laid down in Dobson v. Commissioner, 1943, 320 U.S. 489 [31 AFTR 773], which had severely limited the scope of

> Tax Court is thus for all practical purposes a judicial tribunal operating in the federal judicial system. Whether it is a legislative court created by Congress under Article I, section 8, of the Constitution, like the Customs Court, or some other form of judicial agency placed for convenience of housekeeping in the Executive Branch of the Government is, therefore, merely a matter of legal semantics since, whatever it may be called, it is an 'independent' judicial agency the work of which is not subject to supervision or review in the Executive Branch of the Government, but only by the federal appellate courts."

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review of Tax Court decisions upon the theory that the court was a specialized administrative body. Congress thus made plain that it regarded the Tax Court as a judicial tribunal rather than an administrative agency and intended that its decisions should be subject to the same review accorded judicial decisions.

This action by Congress following its previous action in 1942 in calling the agency a court and its members judges rendered obsolete Chief Justice Taft's early dictum in Old Colony Tr. Co. v. Comm'r Int. Rev., 1929, 279 U.S. 716, 725 [7 AFTR 8875], that "The Board of Tax Appeals is not a court. It is an executive or administrative board, upon the decisions of which the parties are given an opportunity to base a petition for review to the courts after the administrative inquiry of the Board has been had and decided."

The fact that the statute designates the Tax Court as an "independent agency in the Executive Branch of the Government", does not make it such when Congress, admittedly, has provided that it shall have the powers and procedures of a court. As the *Stern* case says, the language placing the Tax Court in the Executive Branch for convenience of housekeeping is merely legal semantics.

It seems to petitioners that the law has developed as shown by the *Stern* decision. The cases repeatedly recognize that the Tax Court possesses the inherent

power of a Court and is bound by established rules of court decision.

The recent decision of the Fourth Circuit in *Fairmont Aluminum Co.* v. *Commissioner,* (1954) 222 F. (2d) 622 shows how the Courts of Appeals regard the Tax Court as exercising judicial functions, and being bound by judicial rules. The Court states:

> "The taxpayer contends also that the doctrine of collateral estoppel, or estoppel by judgment, may not be applied to proceedings of the Tax Court, which, it contends, is not a court at all but an administrative agency. It is perfectly clear, however, that whether the Tax Court be regarded as a court or as an administrative agency it is exercising judicial functions in hearing tax cases of this character; and, when exercising judicial functions, as distinguished from administrative functions[1] it is bound to apply such fundamental judicial doctrines as res judicata and estoppel."

> "[1] That res judicata and estoppel do not apply to administrative action, see *Houghton* v. *Payne,* 195 U.S. 88; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 145; *N.L.R.B.* v. *Baltimore Trust Co.,* 4 Cir., 140 F. (2d) 51, 55; *Wallace Corp.* v. *N.L.R.B.,* 4 Cir., 141 F. (2d) 87, 91."

The Fourth Circuit, in deciding the *Fairmont* case, relied upon *Sunnen* v. *Commissioner,* (1948), 333 U. S. 591, wherein this Court had no difficulty in applying the rules of estoppel to a Tax Court case.

Another typical case is *Pelham Hall Co.* v. *Hassett,* (C.A. 1, 1945), 147 F. (2d) 63, which states (p. 66):

> "In a half-hearted way, the taxpayer contends that an essential requirement to the operation of estoppel by judgment is that the prior adjudication shall have been made by a court of competent jurisdiction; and that the Board of Tax Appeals

> is not a court but merely an executive or administrative board. See *Old Colony Trust Co.* v. *Commissioner of Internal Revenue*, 1929, 279 U.S. 716, 725. * * * Since its reconstitution by the Revenue Act of 1926, the decisions of the Board (now renamed the Tax Court of the United States) have been essentially judicial in character; and it is now well settled that its decisions are a basis of res adjudicata whether they have been reviewed by a court or not. (citing cases) * * * "

Compare *Blair* v. *Commissioner*, 300 U. S. 5 (1937) where the Government argued that res judicata was applicable in a Tax Court case. Also, *United States* v. *International Bldg. Co.*, (1953) 345 U.S. 502 and annotation "Res judicata in income tax cases" 92 L. Ed. 913.

The Board of Tax Appeals has passed upon the constitutionality of taxing acts and has been affirmed or reversed by Courts of Appeals in so doing. This Court, without questioning the power of the Board to pass upon questions of constitutionality has decided those questions in cases which originated in the Board. See *Helvering* v. *Independent Life Ins. Co.*, (1934), 292 U. S. 371, reversing (C.A. 6) 67 F. (2d) 470, which had affirmed 17 B.T.A. 757. Obviously, only courts can determine the constitutionality of Acts of Congress.

The Tax Court has the power to declare Treasury Regulations invalid and has done so in many cases. *Helvering* v. *Credit Alliance Corp.*, (1942) 316 U. S. 107, affirming (C.A. 4) 122 F. (2d) 361, which affirmed 42 B.T.A. 1020; *Commissioner* v. *Gifford Hill & Co.*, (C.A. 5, 1950) 180 F. (2d) 655, affirming 11 T.C. 802.

The Tax Court has concurrent jurisdiction with District Courts in certain tax cases. (See § 7422 (e)

1954 Code) Likewise, it has concurrent jurisdiction with District Courts in bankruptcy cases, provided the action was filed in the Tax Court prior to the adjudication in bankruptcy. Section 274 1939 Code, section 6871 1954 Code.

The foregoing cases have been cited to show that the Tax Court has been accepted as a Court in many fields of law. There is no statutory authority giving the Tax Court power to declare Acts of Congress unconstitutional, to declare Treasury Regulations invalid, to apply rules of res judicata and the like. These are all powers inherent in a judicial tribunal.

If at this late date, it is not recognized that the Tax Court has the inherent power of any judicial tribunal and is bound by judicial rules and precedents, litigation will increase and havoc will be wrought in the administration of tax laws.

This Court has squarely held that the literal language of the Internal Revenue Code as to when a Tax Court decision becomes "final" must give way to accepted Court practice. In *R. Simpson & Co., Inc.* v. *Commissioner,* (1944) 321 U. S. 225, the question involved was the power of this Court to grant a rehearing of a denial of certiorari. The petition for rehearing of the denial of certiorari was not filed until after the expiration of the 25 days provided in the rules for such petitions for rehearing.

The question arose because § 1140 of the Internal Revenue Code (the same section involved in the case at bar) provides that a Tax Court decision becomes "final" under certain conditions, including:

> "Upon the denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the

petition for review dismissed by the Circuit Court of Appeals; * * *."

In the *Simpson* case, this Court refused to grant the petition for rehearing because filed more than 25 days after the denial of the petition. However, it directly held that this Court had the right to grant rehearings of denials of certiorari if petitions therefore were filed within the 25 days provided in the rules.[5]

It is our position that the *Simpson* case establishes the rule that the word "final" does not deprive courts in tax cases of the usual discretionary powers that

[5] In its brief in the *Simpson* case, the Government conceded, as we contend here, that a Court has inherent power to reconsider action it has taken. The brief states: "The Government does not contest the jurisdiction of the Court to grant the petition for rehearing of its order denying the petition for certiorari. The answer to the question whether the Court had the power to grant the petition for rehearing depends upon the proper construction of Section 1140 (b) (2) of the Internal Revenue Code. That subsection provides that decisions of the Board of Tax Appeals shall become 'final' where the circuit court of appeals has affirmed, upon 'the denial of a petition for certiorari'. *Helvering* v. *Northern Coal Co.*, 293 U.S. 191, apparently holds 'final' to mean final in the sense that the decision of the Board may not thereafter be disturbed by the reviewing court. That case does not necessarily control here, however, since it dealt with another subsection of what is now Section 1140 which expressly limited to 30 days the period within which the Court might recall its mandate. Section 1140 provides no corresponding restriction as to orders denying certiorari. We suggest that 'the denial of a petition for certiorari' may be construed so as to preserve to the Court its inherent power, during the same term, to reconsider orders denying certiorari. So construed, the expression refers not to the action of the Court on certiorari in the first instance, but to its ultimate action during the same term."

judicial tribunals possess. The established rule is that a court has inherent power to relieve a party from a "final" judgment because of mistake, inadvertency, surprise or excusable neglect. This basic rule is now expressed by Rule 60 (b), Federal Rules of Civil Procedure, which states in part:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * * (6) any other reasons justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. * * * Writs of coram nobis, coram vobis, audita querela and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

While we do not contend that the Tax Court is bound by the Rules of Civil Procedure, we do contend that the Tax Court performs purely judicial functions. That being true, it has the inherent powers of any judicial tribunal to control, amend, open and vacate its decisions to accomplish justice.

In the Court below in the case at bar, much stress is laid upon *Helvering* v. *Northern Coal Co.*, (1934) 293 U. S. 191. In that case this Court had previously affirmed the Court of Appeals on the merits by an equally divided Court. Nearly six months after the mandates issued, petitions for rehearing were filed.

This Court held that it could not grant a re-hearing more than 30 days after the date of issuance of the mandates because of the statutory provision which reads that a Board of Tax Appeals' decision becomes final:

> "Upon the expiration of 30 days from the date of the issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed."

It is obvious that the later *Simpson* case greatly modified the earlier interpretation of Section 1140 in the *Northern Coal Co.* case in order to reach a result which "enables us to do justice to the party if he appears to have the right of the controversy * * *"

It is petitioners' position that there is no greater need for finality in tax cases, where third parties are not involved, than in bankruptcy cases where third parties are involved. This Court has held that a bankruptcy court may set aside an order dismissing a petition and rehear the cause after the time for appeal has expired. In *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, (1937) 300 U. S. 131, this Court stated (p. 136):

> "In the alternative, the respondents argue that where, as here, an adjudication is refused, and the case is retired from the docket, the requirement that an appeal shall be perfected within thirty days from the order of dismissal deprives the court of power to reinstate and rehear the cause after the expiration of the time limited for appeal. They insist that the act contemplates the speedy disposition of causes in bankruptcy and therefore fixes a brief period for appealing from orders therein. To permit the court to rehear a cause after the time for appeal has expired, and to enter a fresh

order which is appealable, would, they urge, tend unduly to extend the proceedings, create uncertainty as to the rights of the debtor and creditors, and ignore the intent of Congress. But we think the court has the power, for good reason, to revise its judgments upon seasonable application and before rights have vested on the faith of its action. Courts of law and equity have such power, limited by the expiration of the term at which the judgment or decree was entered and not by the period allowed for appeal or by the fact that an appeal has been perfected. There is no controlling reason for denying a similar power to a court of bankruptcy or for limiting its exercise to the period allowed for appeal. The granting of a rehearing is within the court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion, if entertained, is not the subject of appeal. A defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuse to entertain it, does not extend the time for appeal. Where it appears that a rehearing has been granted only for that purpose the appeal must be dismissed. The court below evidently thought the case fell within this class. On the contrary, the rule which governs the case is that the bankruptcy court, in the exercise of a sound discretion, if no intervening rights will be prejudiced by its action, may grant a rehearing upon application diligently made and rehear the case upon the merits; and even though it reaffirm its former action and refuse to enter a decree different from the original one, the order entered upon rehearing is appealable and the time for appeal runs from its entry. * * * "

The mere fact that Section 1140, Internal Revenue Code, states when a decision of the Tax Court shall become final can have no unique significance on the power of the Tax Court over its decisions or judgments. There comes a time when the judgment or decision of all courts becomes final so as to preclude an appeal. For instance, a judgment or order of a United States District Court becomes final 30 days after its entry unless motions are made subsequent to its entry which terminate the running of the time for appeal. See Rule 73 (a) Federal Rules of Civil Procedure. However, the inherent power of the District Court to vacate its judgment after time for appeal has lapsed cannot be doubted.

Some of the decisions cited by the court below indicate that there is some peculiar necessity in Tax Court cases to know when a decision is "final" in order to inform the Commissioner when he can make an assessment, or allow a credit or make a refund. See *Denholm & McKay Co.* v. *Commissioner,* (C.A. 1, 1942) 132 F. (2d) 243, 30 AFTR 572. This position is not realistic. There is nothing sacred about an assessment. Assessments, credits, abatements and refunds of taxes are being made all the time. For example, in the case of a jeopardy assessment, the assessment is made and often the tax collected. Yet as the result of a settlement or a Tax Court decision the Commissioner may have to allow credits, abatements or refunds. No particular administrative problem would arise as the Commissioner would have the power to make the assessment until the decision was reversed or modified. Until the decision was reversed or modified on a proper showing, the assessment would continue in existence. The situation would be exactly the same as exists on an appeal from the Tax Court where the taxpayer

elects to pay the deficiency rather than give bond. If the Appellate Court reverses, the taxpayer receives a refund if he has paid the tax.[6] There is no greater necessity for finality in Tax Court cases than in bankruptcy cases where the rights of a debtor and creditors are involved. In fact, in Tax Court cases no rights of third parties will be involved. In the instant case, no rights of others have vested on the faith of the Court's decision of April 8, 1954. A United States District Court in a tax refund suit would have the power to vacate its judgment under the state of facts that exists in the case at bar. Consequently, it can be seen that from an administrative standpoint the fact that a "final" decision might be reopened or vacated does not create burdensome uncertainty.

It should be pointed out that § 1140 of the Internal Revenue Code does not mean that in all situations the decision becomes "final" within three months from the entry of decision if no petition for review is filed. In *Denholm & McKay Co.* v. *Commissioner,* (C.A. 1, 1942) 132 F. (2d) 243, 30 AFTR 572, it is stated at page 576:

> "Despite statutory provisions requiring appeals to be taken within a stated period 'after the entry of the judgment' or 'after the judgment is rendered' or words to the same effect, it has long been

[6] Section 1146, Internal Revenue Code of 1939 provides:

"SEC. 1146. *Refund, Credit, or Abatement of Amounts Disallowed.* In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Tax Court is disallowed in whole or in part by the court, the amount so disallowed shall be credited or refunded to the taxpayer, without the making of claim therefor, or, if collection has not been made, shall be abated."

held that if a petition for rehearing is seasonably presented and entertained by the court, the time limited for appeal does not begin to run until the petition is disposed of. [citing many Supreme Court cases]. The foregoing rule has been applied to timely petitions for rehearing filed in the Board of Tax Appeals; in such cases the period for filing a petition for court review does not begin to run until the Board has disposed of the petition for rehearing. *Griffiths* v. *Commissioner,* 7 Cir. 1931, 50 F. (2d) 782; *Burnet* v. *Lexington Ice & Coal Co.,* 4 Cir. 1933, 62 F. (2d) 906; *Helvering* v. *Continental Oil Co.,* 1933, 63 App. D. C. 5, 68 F. (2d) 750; *Helvering* v. *Louis,* 1935, 64 App. D. C. 263, 77 F. (2d) 386, 99 A. L. R. 620. * * * "

The point is that Section 1140, Internal Revenue Code, dealing with the finality of decisions is interpreted the same as other statutes dealing with finality of judgments. Therefore, the cases cited by the court below which base their conclusion on the "peculiar" language of that section are out of step with *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.,* (1937) 300 U. S. 131, 81 L. Ed. 557.

As pointed out in *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.,* the granting of a rehearing was discretionary with the trial court. Petitioners were before the Tax Court not as a matter of right on their motion to vacate the decisions but by special leave of Court. The Tax Court properly exercised its discretion in vacating the decisions and granting petitioner a further hearing on the merits since the additional evidence proffered showed the decisions of the Tax Court to be wrong.

We submit that as a matter of law, the rule as announced by the Sixth Circuit in the *Reo Motors* case should be adopted by this Court.

As stated at the outset of the argument, we deem it necessary to understand the legislative and judicial background, origin and functions of the Tax Court. Consequently, that information follows.

Legislative and Judicial History of The Tax Court of the United States (Formerly the Board of Tax Appeals)

When the first income tax law was enacted after the ratification of the Sixteenth Amendment, the Government had the power to summarily collect taxes.[7] Upon the basis of returns filed, or audits made, the amount of the tax determined was entered upon assessment lists and certified to various collectors for collection. If the taxes so assessed were not promptly paid, they were collected under warrants of distraint or by some other summary method. Whether the tax, or the amount thereof, was right or wrong, the taxpayer had no alternative but to pay. However, if the tax was paid under protest, the taxpayer had the right to file a claim for refund. If the claim for refund was rejected or not acted upon within a specified period of time, suit for recovery of the tax might be filed.

The First World War necessitated the collection of greatly increased revenue. This need was met by the enactment of very complicated and far-reaching income tax acts. These included not only a normal tax at a fixed rate on individuals, but also a surtax at graduated rates. An income tax at a flat rate was imposed on corporations. In addition, corporations

[7] This historical argument is based largely upon an address by Bolon B. Turner, Judge of the Tax Court, entitled: "The Tax Court of the United States, Its Origin and Functions", at the conference on The History and Philosophy of Taxation, held at the College of William and Mary in Virginia, April 15, 1955, pp. 31-49.

were subjected to war profits and excess profits tax at graduated rates. At that time even the concepts of what constituted income had not been too well settled, to say nothing of the applicability of the many new and complex provisions of the statute. This meant that, despite the earnest efforts of most taxpayers to report honestly their income and tax thereon, there was no assurance that upon audit of their returns, they would not be faced with claims for substantial amounts of additional tax.

The staff of the Bureau of Internal Revenue was inadequate to cope with the problem, with the result that taxpayers were likely to be faced with an assessment and demand for payment of a substantial amount of additional tax on the basis of a superficial examination of their returns. This demand for additional tax frequently was made many years after the alleged untaxed income had been earned. In many instances, war earnings had been lost in subsequent operations, or had been paid out in dividends or invested in fixed assets. All this meant that the policy of paying taxes when demanded, and litigating afterward, would often mean disaster to healthy and thriving enterprises. A later showing in a suit for refund that the tax was not due could not revive a business that had ceased to exist. Business, Government and Congressional leaders all agreed that something should be done to remedy the situation.

Treasury Recommendations for a Board of Tax Appeals

Revenue Act of 1924

By a letter dated November 10, 1923, to the Chairman of the Committee on Ways and Means, the Secretary of the Treasury recommended that the Congress

"establish a Board of Tax Appeals in the Treasury, but independent of the Bureau of Internal Revenue to hear and determine cases involving the assessment of internal revenue taxes."[8] The Revenue Bill, as reported to the House of Representatives, provided for the creation of a Board independent of the Treasury Department. The Report of the Ways and Means Committee stated in part:[9]

> "Under the provisions of the proposed bill creating a Board of Tax Appeals the taxpayer may, prior to the payment of the additional assessment of income, war-profits, excess-profits, or estate taxes, appeal to the Board of Tax Appeals and secure an impartial and disinterested determination of the issues involved. In the consideration of the appeal both the Government and the taxpayer will appear before the board to present their cases, with the result that each member of the board will sit solely as judge and not as both judge and advocate. * * * The divisions of the board will sit locally throughout the United States to enable taxpayers to argue their cases with as little inconvenience and expense as is practicable."

The bill provided that notice and opportunity to be heard should be given the taxpayer and the Commissioner and that a decision should be made as quickly as practicable. The bill then provided with respect to the proceedings, as follows:

> "The proceedings of the Board and its divisions shall be informal and in accordance with such rules as the Board may prescribe. Opinions (other than findings of fact) shall not be in writing

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[8] Annual Report of Secretary of Treasury, 1923, p. 10.

[9] Report No. 179, Ways & Means Committee, 68th Cong., 1st Session, p. 8.

unless the Chairman so desires. The findings of fact in each case shall be reported in writing."

After the bill had passed the House and had been reported to the Senate by the Committee on Finance, an amendment was offered on the floor of the Senate by Senator Jones of New Mexico to provide for a Board with a formal procedure. Supporting the amendment and covering its purposes, Senator Jones said in part:[10]

> "* * * The hearings are for judicial purposes. They are supposed to be conducted along the lines of judicial procedure. * * * They determine controversies between the Government and taxpayers. Evidence is to be submitted bearing upon the question, and a decision is to be reached which, for practical purposes, in most cases at least, is a final decision. * * * I submit that when there is a controversy between the Government and a taxpayer which shall follow through the various lines of procedure and finally reach the board of appeals, when it gets there all the proceedings should be public proceedings, the evidence should be taken down in writing, there should be a finding of fact and the decision of the board should be in writing and filed in the case just the same as in any other judicial proceeding, because that is what the case would be. It would be a judicial proceeding."

Senator Walsh, of Montana, supported the amendment, stating, in part, as follows:[11]

> "* * * I think that the proceedings ought to approximate as nearly as practicable to proceed-

[10] Congressional Record, May 8, 1924, p. 8132.

[11] Congressional Record, May 8, 1924, p. 8133.

> ings in court. It really is intended in a way as an equity judicial tribunal for the determination of those matters. There is no means that can be devised of making a court decide the cases aright in accordance with sound reason better than by requiring the court to file its opinion, showing to the world how it arrived at the conclusion which it reaches."

The amendment was adopted and subsequently, in a conference between the two Houses, it was accepted by the conferees of the House. This action was over the strenuous objection of Congressman Ogden Mills, a ranking member of the Committee on Ways and Means. When the conference report was before the House, Mr. Mills took the floor to speak against it.[12] After noting the recommendation of the Treasury Department for the creation of a board, with informal procedure, to settle tax cases, Mr. Mills, in part, said:

> "* * * this House passed a bill providing for the creation of a board of tax appeals, so that if the taxpayer was notified that his tax would be increased before the tax was assessed he had a right to go before that board of appeals, which was appointed by the President and was not a part of the Treasury Tax Bureau, but was an administrative body nevertheless. He would sit down with them, one member if necessary, and adjust his tax liability expeditiously and justly; and if the Government disagreed with the findings, the Government could go to court; and if the taxpayer was aggrieved, he could go to court. * * *"
>
> "* * * Now what the Senate did was to change the board of appeals, which was an administrative body sitting informally to adjust tax cases, into a

[12] Congressional Record for May 26, 1924, Part 9, Vol. 65, pp. 9539 and 9540.

> court of record, and the House conferees have agreed to that. * * * the testimony must be taken in writing, the rules of evidence apply, a written opinion is to be given, and all of the testimony in the proceeding is to be a public record."

Despite Mr. Mills' objection, the report was adopted and the bill became the Revenue Act of 1924. President Coolidge recognized the character of the tribunal which had been created. This is shown by the statement made at the time of signing the measure, which reads, in part:

> "The provisions of the bill, however, with reference to the Board, make it in all its essentials practically a court record. The Board is to be bound by formal rules of evidence and procedure. In each case a formal record must be prepared and all oral testimony * * * must be reduced to writing and an opinion in addition to the findings of fact and a decision must be written. * * * "

As created by the Revenue Act of 1924 the Board had no duties, purposes, or functions which were not judicial in character. Despite this it had no power to enter a final judgment or decision. The Act provided that either the taxpayer or the Government should have the right to institute a *de novo* proceeding in the proper District Court, or in the case of the taxpayer, in the Court of Claims, and thereby have the privilege of again litigating such part of the decision of the Board with which it was not in agreement.

It should be mentioned that this Court when deciding *Williamsport Wire Rope Co.* v. *United States,* (1928) 277 U. S. 551, obviously had not been advised of the legislative history of the Revenue Act of 1924. This is so because the opinion (pp. 562-563) relied upon

and cited the reports of the Ways and Means and Finance Committees. Justice Brandeis, when writing the opinion, apparently had not been informed that, after the writing of the Committee Reports, the entire character of the Board of Tax Appeals had been changed by an amendment on the Senate floor which was agreed to in conference. It is significant that the *Williamsport* case is one of the cases most frequently cited for the proposition that the Tax Court (formerly the Board of Tax Appeals) is a mere administrative agency.

Revenue Act of 1926

The Revenue Act of 1926 provided that decisions of the Board of Tax Appeals would be final and reviewable only by United States Courts of Appeals. A description of the legislative events leading up to the changes in the 1926 Act is helpful in understanding the intention of Congress to create a judicial rather than an administrative tribunal.

The Treasury Department completely changed its views as to the desirability of a formal judicial tribunal to determine tax controversies and recommended that the Board of Tax Appeals be given the power to enter decisions which would be reviewable only by the Circuit Courts of Appeals. Excerpts from the hearings on the 1926 Act are set forth in the appendix hereto, page 46.

The Ways and Means Committee Report of the 1926 Act states:[13]

> "In the view of the committee the decisions of the board are judicial and not legislative or

[13] House of Representatives Report No. 1, 68th Congress, 1st Session, p. 20.

administrative determinations. Review of judicial decisions may be had by direct appeal to the courts as well as by petitions to the courts for the enforcement of an administrative order, or by extraordinary remedy and suits for refunds. Further, no rehearing need be provided before the reviewing court, and the review of the decisions of the board may be limited to the record made before the board. The imposition upon the court of the duty of reviewing judicial decisions, such as those of the board, is not the imposition of a nonjudicial duty, * * * "

At page 18 of the report, it is stated:

"No other court in the world tries cases which in the aggregate involve such great amounts. * * * Under the appellate procedure from the board (hereinafter discussed) the jurisdiction of the board in tax matters is similar to that heretofore held by the judges of the Federal district courts."

At page 19, it is stated:

"The procedure is made to conform as nearly as may be to the procedure in the case of an original action in a Federal district court."

After the bill had passed the House, it was reported to the Senate by its Finance Committee, in a report which was in substance the same as that of the Committee on Ways and Means. During the debate on the floor of the Senate, the question was raised as to the character of evidence permissible in proceedings before the Board, fear being expressed that *ex parte* hearings might be conducted and that hearsay evidence might be admissible.

The floor discussion makes it clear that the Senate understood that the Board of Tax Appeals would func-

tion as a judicial tribunal and follow court procedure and rules of evidence. Excerpts from the discussion on the Senate floor are set forth in the appendix hereto, page 51.

The Revenue Act of 1926 incorporated the views expressed at the hearings and on the floor of the House and Senate. It provided in sections 1001-1005, that the hearings and proceedings were to follow as nearly as possible those in Federal District Courts. It was provided, also, that the admissibility of evidence should be determined according to the rules of evidence prevailing in courts of equity in the District of Columbia. A taxpayer could no longer proceed in the Board and if he lost there, have a trial *de novo* in the District Court, or in the Court of Claims. In the same way, the Government could no longer institute a new proceeding to collect taxes under claims decided against it by the Board. A taxpayer instituting a proceeding in the Board was faced with a decision which was final and thereafter had no right to litigate his liability anew in the District Court or the Court of Claims. The jurisdiction of the Board and of those Courts was for all practical purposes concurrent. It was further provided that there should be direct appeal to the proper Circuit Court of Appeals.

In addition to the procedural provisions, the 1926 Act in sections 273 and 284 provided that if an appeal was taken to the Board it had the power to determine the correct tax liability. It could increase the deficiency asserted by the Commissioner or determine that a refund was due the taxpayer.

After the enactment of the 1926 Act, an appeal was taken from the Board of Tax Appeals to the First Circuit. That Court certified to this Court the ques-

tion of whether such an appeal presented a "case or controversy" which could properly be heard by Courts of Appeals in exercising their judicial function. In *Old Colony Trust Co.* v. *Commissioner,* (1929) 279 U. S. 716, this Court answered in the affirmative.

Revenue Act of 1928

Prior to the enactment of the Revenue Act of 1928, the Seventh Circuit decided the case of *Chicago Railway Equipment Co.* v. *Blair,* (1927) 20 F. (2d) 10. The Ways and Means Committee Report[14] on the Revenue Act of 1928, referring to the *Chicago Railway Equipment Company* case, stated:

> "Force and Effect of Rules.—A recent decision by the circuit court of appeals for the seventh circuit indicates that there is some disposition to regard the Board of Tax Appeals as an investigative rather than a judicial body, and to require it to reach its decisions not merely on the basis of the evidence presented in the record, but on the basis of such additional evidence outside the record as may be necessary fully to develop the taxpayer's case. The Committee is of the opinion that the board's function is purely judicial, and in order to clarify the situation has provided that no decision of the board (whether rendered before or after the bill becomes law) should hereafter be modified or reversed because the board or any of its divisions has failed to consider evidence not adduced before the board or division. At the same time the committee has provided that the rules of practice and procedure of the board shall, just as the Federal equity rules, have the force and effect of law."

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[14] House Report No. 2, 70th Congress, 1st Session, p. 30.

The Finance Committee was of the opinion that because the existing law clearly contemplated judicial and not administrative proceedings by the Board of Tax Appeals, further legislation on the subject was unnecessary. The Finance Committee report states:[15]

> "Modification or reversal of board decision. In view of certain expressions in a recent court opinion, the House bill in section 601 provides that no decision of the board shall be modified or reversed because the board has failed to consider evidence not adduced before it. While an appellate court has the right and duty, if an error of law has been made, to remand a case to the board for subsequent proceedings in accordance with law, the existing provisions of law clearly contemplate judicial, not administrative, procedure on the part of the board and the committee can see no need of further legislation on this subject. It is not the duty of the board to make investigations of tax cases but to decide the case on the basis of evidence properly placed before it by the commissioner and the taxpayer."

Revenue Act of 1942

In the Revenue Act of 1942 the name of the Board of Tax Appeals was changed by an amendment, which read:

> "The Board shall be known as The Tax Court of the United States and the members thereof shall be known as the presiding judge and the judges of The Tax Court of the United States."

In 1948 Congress amended § 1141 (a), Internal Revenue Code of 1939 (§ 7842, 1954 Code), by Public Law No. 773, 80th Congress, 2d Session, by providing

[15] Senate Report No. 960, 70th Congress, 1st Session, p. 38.

that Courts of Appeals shall have exclusive jurisdiction to review decisions of the Tax Court "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." This amendment was made to overcome the rule of *Dobson* v. *Commissioner*, (1944), 320 U. S. 489, which made applicable to determinations of the Board of Tax Appeals the finality of administrative decisions in other fields. This is a further indication of the judicial nature of the Tax Court.

Internal Revenue Code of 1954

In the Internal Revenue Code of 1954, the provisions relating to the Tax Court are placed in Chapter 76, "Judicial Proceedings." That chapter also covers the jurisdiction of district courts in actions by or against the United States which involve taxes. It likewise includes the provisions governing appeals to Courts of Appeals and certiorari to this Court in tax cases. In the 1939 Code, the Tax Court provisions were not placed in the same chapter as the District Court provisions.

CONCLUSION

The law is established that the Tax Court is a judicial tribunal. As such, it has consistently exercised the inherent powers of a Court. This power to act as a judicial tribunal should be construed to give it the same control over its decisions and judgments as other trial courts.

Respectfully submitted,

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January 8, 1957

APPENDIX

STATUTES INVOLVED

Internal Revenue Code of 1939:

Sec. 272. PROCEDURE IN GENERAL.

* * * * *

(b) *Collection of Deficiency Found by the Tax Court.*—If the taxpayer files a petition with the Tax Court, the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Tax Court which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

* * * * *

(h) *Final Decisions of Tax Court.*—For the purposes of this chapter the date on which a decision of the Tax Court becomes final shall be determined according to the provisions of section 1140.

* * * * *

Sec. 1100. STATUS.

The Board of Tax Appeals (hereinafter referred to as the "Board") shall be continued as an independent agency in the Executive Branch of the Government. The Board shall be known as The Tax Court of the United States and the members thereof shall be known as the chief judge and the judges of The Tax Court of the United States.

Sec. 1113. SERVICE OF PROCESS.

The mailing by registered mail of any pleading, decision, order, notice, or process in respect of proceedings before the Tax Court shall be held sufficient service of such pleading, decision, order, notice, or process.

Sec. 1117. REPORTS AND DECISIONS.

(a) *Requirement.*—A report upon any proceeding instituted before the Tax Court and a decision thereon shall be made as quickly as practicable. The decision shall be made

by a judge in accordance with the report of the Tax Court, and such decision so made shall, when entered, be the decision of the Tax Court.

(b) *Inclusion of findings of fact or opinions in report.*—It shall be the duty of the Tax Court and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Tax Court shall report in writing all its findings of fact, opinions and memorandum opinions.

(c) *Date of decision.*—A decision of the Tax Court (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Tax Court. If the Tax Court dismisses a proceeding for reasons other than lack of jurisdiction and is unable from the record to determine the amount of the deficiency determined by the Commissioner, or if the Tax Court dismisses a proceeding for lack of jurisdiction an order to that effect shall be entered in the records of the Tax Court, and the decision of the Tax Court shall be held to be rendered upon the date of such entry.

* * * * *

SEC. 1140. DATE WHEN TAX COURT DECISION BECOMES FINAL.

The decision of the Tax Court shall become final—

(a) *Petition for review not filed on time.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(b) *Decision affirmed or petition for review dismissed.*—

(1) Petition for certiorari not filed on time.—Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Tax Court has been affirmed or the petition for review dismissed by the court of appeals and no petition for certiorari has been duly filed; or

(2) Petition for certiorari denied.—Upon the denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the petition for review dismissed by the court of appeals; or

(3) After mandate of Supreme Court.—Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Tax Court be affirmed or the petition for review dismissed.

* * * * *

Sec. 1142. PETITION FOR REVIEW.

The decision of the Tax Court rendered after February 26, 1926 (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318 of the Revenue Act of 1926, 44 Stat. 65, 83, relating to hearings before the Tax Court prior to February 26, 1926) may be reviewed by a court of appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered, or, in the case of a decision rendered on or before June 6, 1932, within six months after the decision is rendered.

Internal Revenue Code of 1954:

Sec. 7422. CIVIL ACTIONS FOR REFUND.

* * * * *

(e) Stay of Proceedings—

If the Secretary or his delegate prior to the hearing of a suit brought by a taxpayer in a district court or the Court of Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes) mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is the subject matter of taxpayer's suit, the proceedings in taxpayer's suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court for a redetermination of the asserted deficiency, and for 60 days thereafter. If the taxpayer files a petition with the Tax Court, the district court or the Court of Claims, as the case may be, shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund. If the taxpayer does not file a petition with the Tax Court for a redetermination of the asserted deficiency, the United States may counterclaim in the taxpayer's suit, or intervene in the event of a suit as described in subsection (c) (relating to suits against officers or employees of the United States), within the period of the stay of proceedings notwithstanding that the time for such pleading may have otherwise expired. The taxpayer shall have the burden of proof with respect to the issues raised by such counterclaim or intervention of the United States except as to the issue of whether the taxpayer has been guilty of fraud with intent to evade tax. This subsection shall not apply to a suit by a taxpayer which, prior to the date of enactment of this title, is commenced, instituted, or pending in a district court or the Court of Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes).

Sec. 7483. PETITION FOR REVIEW.

The decision of the Tax Court may be reviewed by a United States Court of Appeals as provided in section 7482 if a petition for such review is filed by either the Secretary (or his delegate) or the taxpayer within 3 months after the decision is rendered. If, however, a petition for such review is so filed by one party to the proceeding, a petition for review of the decision of the Tax Court may be filed by any other party to the proceeding within 4 months after such decision is rendered.

Hearings Before the Ways and Means Committee on the Revenue Bill of 1926[1]

A. W. Gregg, Solicitor of Internal Revenue, stated with respect to the Board of Tax Appeals:

> "* * * They have really done a wonderful piece of work in getting started, producing, and establishing the precedents that they have. It seems to me that in order to be able to carry out what they have begun so well, they should be made a court in name as well as in fact, and that provision should be made which will enable the board to procure the services of competent men; * * *."
>
> * * * * *
>
> "The Treasury Department originally recommended a board in the Treasury Department with informal procedure to settle tax cases. It was recognized at the time that there were two needs—one for a board to settle tax cases—and I mean settle them in the sense of settling them across the table—and the other a court to establish precedents, the latter not for its value in deciding the cases which would be presented to it, because they necessarily must be limited in number, but for the purpose of establishing prece-

[1] Hearings, Ways and Means Committee Revenue Revisions 1925, pg. 932, 68th Cong., 2nd Session.

dents to guide the bureau in the settlement of other cases and to guide the taxpayer in disposing of his case.

"The original recommendation of the Treasury Department was for a board to settle tax cases. Congress changed that and gave us the other, which was also much needed—a court to establish precedents for the disposition of other cases pending in the department.

"Having done that, it seems to me that Congress should go the whole way and establish it in name and in other respects as they have established it in fact—as a court; * * *.

* * * * *

Mr. Hadley: "Referring to the recommendation to make the board a court, I would like to ask, before you leave that, whether, aside from that, there are any features in the present status of the board that it will be necessary to change to give it the functions of a court?

Mr. Gregg: "I think if you make it a court the attributes that follow a court would take care of that, such as the matter of power to punish for contempt. I think that would belong to the court without any express statutory provision. Of course, that could be specifically taken care of.

"You can state almost without exception that where a taxpayer thinks a tax is not owing he is going to take advantage of his right of appeal to the board rather than pay the tax and file a claim for refund.

Mr. Chindblom: "Then it follows that the work of the Board of Tax Appeals would be continuous.

Mr. Gregg: "The work of the board will be reduced when the excess profits tax is disposed of, but there is going to be always a great deal of work for the board in connection with the income taxes alone.

Mr. Chindblom: "That would relieve the district courts of many of the refund cases?

Mr. Gregg: "Yes; it would relieve the district courts decidedly. I think in connection with the recommendation that the Board be made a court provision should be made for an appeal direct to the circuit court of appeals. There is no logic in having

a case go to the board and tried on its merits, with a careful finding of facts made and an opinion written, and then have the taxpayer file a claim for refund and put it up to the department again and then go back to the district court and start over again. It is in the interest of economy both of money and time to have an appeal direct from the board to the circuit court and have a final disposition of the case in the one proceeding.

Mr. Garner: "Suppose this committee or Congress should not be willing to create the board as a court as you have suggested. What amendment, if any, should be made with reference to its continuation as a board?

"I do not believe, speaking my sentiments as to what you could get through Congress, that you can get through Congress an amendment to the law making this board a court, and if we cannot do that what would be your suggestion with reference to the continuation of the board and the conditions under which it should work?"

Mr. Gregg: "Give it as many of the attributes of a court as possible without calling it a court. Provide for an appeal from the board direct to the circuit court of appeals. That can be done whether it is made a court or not.

"Make the term of office as long as you feel it proper to do and make the salary as high as possible"

Benjamin H. Littleton, who was the then Chairman of the Board of Tax Appeals and who is now a judge of the Court of Claims, in discussing the general operation of the Board since its creation said (Hearings, p. 562):

"There have been several mandamus proceedings instituted against the board, I think seven in number, some involving questions of jurisdiction and others involving questions of the board procedure. One case involving the board procedure has been decided, wherein the court decided that the board had to grant the taxpayer and the commissioner an opportunity to appear before the full board, upon review, holding that we did not have any legal right to refuse to do that.

The Chairman, Mr. Wm. R. Green: "I think I can safely say without making a canvass around the board, that that never was the intention of Congress.

* * * * *

Mr. Garner: "If Congress saw proper to give you the right to provide rules and regulations of procedure, and created you in every essential quality as a court, although calling you a board, I do not understand just how the courts would undertake to set that aside, and direct you as to your procedure. * * *"

Senate Debate, 1926 Act

Mr. Reed of Missouri: "And in the Board of Tax Appeals is it not true that they consider affidavits and letters and hearsay evidence of every sort—evidence that does not come within the ordinary rules of evidence?"

(Congressional Record, February 8, 1926, Vol. 67, page 3530)—

Mr. Reed of Pennsylvania: "I do not know what the practice has been in the past; but we have taken care that it shall not be so in the future, because we have provided in the bill that the rules of evidence in the Board of Tax Appeals shall be the same as those prevailing in the courts of equity in the District of Columbia; and if they should receive any such hearsay statements as the Senator has described, of course, that would be reversible error."

Mr. Reed of Missouri: "The reason why I ask the question is that my understanding is that the courts have sustained actions of boards based upon just the kind of evidence I described a moment ago."

Mr. Reed of Pennsylvania: "That is what we are trying to get away from now."

Mr. Reed of Missouri: "And I am glad to know that that has been avoided."

Mr. George: "Mr. President, if the Senator will pardon me, I may suggest that every reasonable effort has been made to bring this board out of the class of a mere administrative body into the status of a court; and I think the rules of evidence to which the Senator refers have been amply cared for in this provision."

The following statements were made from the floor of the Senate on February 11, 1926, in the consideration of the proposed Revenue Act of 1926:

Senate Page 3749

Mr. Norris: "I want to get the Senator's idea about some questions that have arisen in my mind regarding the Board of Tax Appeals. I believe that it is more or less, and ought to be more or less, of a judicial nature. They will pass purely and solely upon questions of law. Am I right in that statement?

Mr. King: "Questions of fact necessarily are involved."

Mr. Norris: "Oh, yes; I ought to modify my statement to that extent."

Mr. King: "They are in a sense nisi prius courts."

Mr. Norris: "But it is their duty to say what the law is on the facts as they find them?"

Mr. King: "Yes."

Mr. Norris: "They are just the same as any other court in that respect?"

Mr. King: "Yes."

Senate Page 3750

Mr. Norris: "It seems to me we are considering this tribunal as having a rather judicial aspect, and that, I think, is the way it ought to be considered. * * *"

Senate Page 3752

Mr. Shortridge: "I am merely inviting the Senator's attention and that of the other Senators to the proposition that we want a speedy and a correct determination of these cases, and this so-called Board of Tax Appeals is, in point of its functions, a judicial tribunal; and no taxpayer's claim, no demand of the Government, should be finally determined by that body without a thorough examination of the facts and the law.

"Moreover, I invite the Senator's attention to this proposition: The bill vests in the board the functions of a trial court. It is to hear and determine facts as well as to resolve the law applicable to those facts. It is not merely a tribunal to listen to arguments touch-

ing matters of law. They receive evidence, they listen to witnesses, they receive evidence oral and documentary, as a jury does. Therefore I am suggesting that the number, 16, when divided and holding court throughout this vast Republic, is not too great a number to speed on the work in hand."

Senate Page 3755

Mr. Reed of Pennsylvania: "The procedure outlined in the bill as reported from the committee treats the Board of Tax Appeals practically as a court of original jurisdiction. An appeal from the board to the circuit court of appeals is in all respects similar to an appeal from a district court to the circuit court of appeals. The case is reviewed on the record and the appellate court has the power to reverse, with or without a venire de novo, or to affirm, but it does not try the case de novo. It does not take testimony. The practice is appellate practice entirely."

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 371

BESSIE LASKY AND JESSE L. LASKY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The findings of fact and opinion of the Tax Court promulgated April 8, 1954 (R. 62–92), are reported at 22 T. C. 13. The order of the Tax Court granting a rehearing (R. 135) and the memorandum orders and decisions of the Tax Court entered June 30, 1955 (R. 138–145), after the rehearing, are not reported. The opinion of the Court of Appeals (R. 476–481) is reported at 235 F. 2d 97.

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1956. (R. 482.) The petition for a writ of certiorari, filed on August 31, 1956, was granted on

November 5, 1956. (R. 486.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether, in the circumstances of this case, the Tax Court lacked jurisdiction to vacate its decisions and grant taxpayers a rehearing after the decisions had become final under the mandate of Sections 1140 and 1142 of the Internal Revenue Code of 1939.

STATUTE INVOLVED

Sections 272 (a) (1), (b) and (h), 273 (e), 277, 322 (c), 1100, 1113, 1117 (a), (b) and (c), 1140 (a), (b), (c), (d) and (e), and 1142 of the Internal Revenue Code of 1939 are set forth in the Appendix, *infra*, pp. 47–54.

STATEMENT

The Court of Appeals granted the Commissioner's motion to dismiss for lack of jurisdiction taxpayers' petitions for review on the ground that the petitions for review were not filed within three months after the decisions of the Tax Court were rendered and therefore, by virtue of Sections 1140 and 1142 of the Internal Revenue Code of 1939,[1] the Tax Court's decisions had become final. (R. 461–473, 476–477, 481.) The facts are not in dispute.

On April 8, 1954, the Tax Court promulgated its findings of fact and opinion in these consolidated cases (R. 62–92). The Tax Court ruled that a cash payment received by taxpayer Jesse L. Lasky in the

[1] References to "Internal Revenue Code" or "Code" are, unless otherwise indicated, to the Internal Revenue Code of 1939.

amount of accumulated shares of film rentals was taxable as ordinary income and not capital gain. The opinion concluded with the following words (R. 92): "The respondent's determination is sustained. Decisions will be entered for the respondent." On April 8, 1954, the Tax Court rendered its decision in each case, deciding in the case of taxpayer Bessie Lasky that there is a deficiency in income tax for 1943 in the amount of $224,722.55, and in the case of taxpayer Jesse L. Lasky, a deficiency of $224,515.14. (R. 92–93.) A copy of each of these decisions was served by the Clerk of the Tax Court on April 9, 1954, by registered mail on Mr. Herschel B. Green, the first attorney of record for the taxpayers in the Tax Court proceeding. (R. 92–93, 105, 128.) No petition for review of these decisions in the Court of Appeals was filed within three months after the decisions were rendered.

Up to this point taxpayers had been represented in the Tax Court by Messrs. Herschel B. Green and Loyd Wright of Wright, Wright, Green and Wright, and Mr. Harrison Harkins. (R. 62.) However, on or about August 24, 1954, more than three months after the Tax Court rendered its decisions, the present counsel for taxpayers filed with the Tax Court a motion for leave to file a motion to vacate its decisions out of time. (R. 93–94.) Such leave was granted, and on August 24, 1954, taxpayers moved to vacate the decisions of April 8, 1954. (R. 93–94.) The following appears from the four affidavits (R. 95) filed in support of this motion:

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Shortly after April 8, 1954, there were received at the offices of Wright, Wright, Green, and Wright the findings of fact and opinion of the Tax Court in these cases, and on April 14, 1954, a conference was held at those offices attended by taxpayer Jesse Lasky, his secretary, Mr. Rogers, and his attorneys, Mr. Harkins, Judge Milliken, Mr. Wright and Mr. Green (R. 95–96, 101), at which the findings of fact and opinion of the Tax Court were discussed, including such matters as the possibility of reversal on appeal and of compromise (R. 95–96, 99, 101–102, 103–104). Mr. Lasky was told in the course of this conference that the Tax Court decisions in these cases would be received separately from the findings and opinion and he would have three months after the date the decisions were entered within which to appeal. (R. 96, 99, 102, 104.) Mr. Green promised to notify Mr. Lasky on the receipt of the decisions. (R. 102.)

What occurred subsequently is stated in Mr. Green's affidavit as follows (R. 102–103):

> Thereafter, Affiant talked with Mr. Lasky, or his secretary, on two or three occasions, when Affiant was asked if the Decisions had been received, and Affiant informed him on each occasion that they had not. During one or two telephone conversations with Mr. Harkins, we made mention of the fact that the Decisions had not been received and that Affiant was keeping a constant lookout for the receipt [*sic*] of these Decisions, having in mind the ninety-day appeal period above referred to.
>
> On or about July 26, 1954, Mr. Harkins informed Affiant that he had received word from

> the desk of the Tax Clerk that the Decisions had been entered in the two cases on April 8, 1954, and that copies thereof had been mailed to us. Affiant thereupon made an immediate search of the Lasky files in his office, and at that time and for the first time discovered copies of the two Decisions. They were on letter-size paper and had been permanently placed in one of the Lasky files on the correspondence side of the file rather than the legal side. Affiant thereupon, on that same day, telephoned Mr. Lasky and informed him that in going through his files Affiant had found the two Decision[s] and *they* they [*sic*] were dated April 8, 1954.

Mr. Harkins stated that under date of July 20, 1954 (R. 104), he wrote the Clerk of the Tax Court inquiring about the status of the proceedings and (R. 105)—

> That on July 26, 1954, your affiant received a letter from the Clerk of the Court, dated July 23, 1954, informing him that the decisions had been entered and had been served April 9, 1954, upon the first counsel of record in the proceedings, Herschel B. Green, Esq., 111 West Seventh Street, Los Angeles 14, California;

Taxpayers' motion to vacate the decisions was heard on September 14, and 16, 1954. (R. 106–133.) At the hearing the following colloquy between court (Judge Harron) and counsel for taxpayers occurred (R. 125–128):

> The COURT. * * *
>
> I wonder, Mr. Ash, if any explanation has been given to you about why Mr. Harkins, for example, waited so long to ask Mr. Mersch

[Clerk of the Tax Court] about the entry of the decisions. As you all know, decisions to be entered for Petitioner and Respondent, even if you had a complicated order to write, would not take more than a half hour to have drafted, typed, and signed. * * *

* * * * *

Mr. ASH. The only explanation I have is—first of all, I will preface it by saying that any of us who do tax work would certainly take the position that Your Honor is taking, because you recognize that the decision would be simultaneous practically with the findings of fact and opinion except in some unusual situations like you mentioned. The only possible explanation is that, of course, Harkins did repeatedly ask Mr. Green if the decisions had come down and was assured that they had not.

As I understand it, for some reasons the Tax Court sent copies of the findings of fact and opinion to each of the counsel of record but, of course, following the established practice that we all know, the decisions went only to Mr. Green.

The COURT. That still does not give me an answer to the question.

Mr. ASH. I do not know the answer.

* * * * *

Mr. ASH. I cannot understand it and I was astonished as could be when I first heard of this thing, which was just shortly before Mr. Heubusch of our office came down and looked through the file and said there is not a thing in the file since the entry of decisions, no motions or anything, and we just could not believe that that could happen, but it did.

> The COURT. The Calendar Section tells me that the decisions went by registered mail April 9. I guess they went by ordinary mail, not airmail, so it probably reached Los Angeles a week later.

The Commissioner, though expressing regret that the situation had arisen, repeatedly made clear his objection to the granting of the taxpayers' motion to vacate on the ground that the Tax Court was without jurisdiction in the premises. (R. 112–113, 120–122, 129.)

At the hearing of September 14 and 16, 1954 (R. 106–133), no suggestion was made on taxpayers' behalf that a rehearing was desired for the purpose of offering additional evidence on the merits. Nevertheless, subsequently on or about October 11, 1954, taxpayers moved for leave to file an amendment to their motion to vacate the decisions, stating (R. 133) "The purpose of the motion to vacate the decisions is to obtain a rehearing of the case on its merits." Such leave was granted, and the pending motion to vacate the decisions was amended by the addition of the italicized words (R. 134):

> Come now the above-named petitioners by their attorney, Robert Ash, and move the Court vacate the decisions entered herein on April 8, 1954, *for the purpose of granting petitioners a rehearing of the case on its merits.*
>
> The statement of facts and supporting affidavits in support of this motion are incorporated herein by reference. [Italics supplied.]

The statement of facts, which taxpayers filed in support of their amended motion on October 11, 1954

(R. 4), suggested that the court should exercise its discretion and grant the motion to vacate the decisions and order a rehearing because the decisions which were entered for respondent on April 8, 1954, did not come to the attention of taxpayers until more than three months had elapsed (R. 484–485). The statement alleges that copies of the decisions which were mailed to taxpayers' counsel did not actually come to counsel's attention upon their receipt as they were inadvertently misfiled and that consequently, through mistake of fact, counsel advised taxpayers and others making inquiry on their behalf that the decisions had not been received.

The statement then continues (R. 485–486):

> (5) Because petitioners had no knowledge that the decisions had been entered on April 8, 1954, and because their counsel advised them affirmatively upon inquiry that the decisions had not been entered, through no fault or negligence of the petitioners they did not file this motion to vacate the decisions within the time allowed by Rule 19 (e) of the rules of this Court.
>
> (6) In view of the foregoing, good cause exists which justifies the Court in vacating the decisions heretofore entered on April 8, 1954, for the purpose of granting petitioner a rehearing of the case on its merits. At a rehearing of the case the petitioner would present additional evidence which will show that the opinion and decision of the Court is wrong on its merits. The evidence would show:
>
> (a) That the agreement of May 15, 1940, and the supplemental agreement of May 15, 1940,

by which the petitioner sold to Warner Brothers all his right to the Sergeant York Story and Warner Brothers agreed to pay petitioner a part of the gross receipts in varying percentages from the distribution of the photoplay are entirely separate and distinct from the employment contract between petitioner and Warner Brothers dated May 8, 1940.

(b) The evidence would show in detail that a bona fide dispute existed in 1942 between petitioner and Warner Brothers. Additional witnesses would be produced to establish this important fact.

(c) Evidence would be produced to show that the sale by petitioners on December 4, 1942, to United Artists Corporation was a bona fide sale to a third party with no understanding that United Artists Corporation would resell to Warner Brothers. This evidence would show conclusively that United Artists Corporation was not a mere intermediary in the transaction.

(d) The evidence would show in detail the business purpose behind petitioner's sale to United Artists Corporation on December 4, 1942.

(e) Upon receipt of this additional evidence at a rehearing it is petitioner's opinion that the Court will revise its opinion in accordance with the newly-presented facts and hold that the sale by the petitioners of their property rights to United Artists Corporation on December 4, 1942, was a bona fide sale of a capital asset within the provisions of Section 117 of the Internal Revenue Code and that the transaction had been properly reported in their 1942 Federal Income Tax Return. Consequently, the

> decisions on the rehearing would be that there was no deficiency in tax due from the petitioners for the taxable year 1943.

Thereafter, without any further proceedings, by order dated December 13, 1954, Judge Harron granted taxpayers' amended motion and ordered (R. 135)—

> That the decision in each proceeding which was entered on April 8, 1954, be vacated and set aside for the purpose of granting petitioners a further hearing on the merits.

This order of December 13, 1954, recited that it was based on cause shown in the amended motion, lodged October 11, 1954, and in the statement of facts in support thereof (summarized and quoted pp. 7–10, *supra*).

The Acting Chief Counsel, Internal Revenue Service, moved to vacate this order of December 13, 1954, on the ground that the Tax Court's decisions had become final and the court was therefore without power to grant taxpayer's motion. (R. 135–137.) This motion and a motion for review by the entire Tax Court of the order vacating the decisions were denied. (R. 137.)

Pursuant to the order of December 13, 1954, the Tax Court held a further hearing (January 21 and 26, 1955), devoted exclusively to the merits. (R. 300–385.) Testimony of four witnesses was taken, including Mr. Lasky's accountant. Mr. Lasky himself gave additional testimony. (R. 139–140.) The Commissioner once more stated his objection to the new hearing on the ground that the Tax Court was without jurisdiction. (R. 383.)

By orders and decisions entered on June 30, 1955 (R. 138–141, 144–145), the Tax Court stated that it had concluded (R. 138–139)—

> that there existed extraordinary circumstances and good cause for granting extraordinary relief, namely, (1) further hearing on the merits to enable the petitioner to present new and additional evidence; and (2) reconsideration by the Court of the issue presented to determine whether the Court made any erroneous conclusion of fact or law in its original findings of fact and conclusions of law. * * * In order to reconsider the issue in this proceeding on the merits and to receive further and additional evidence, the Court vacated its decision entered on April 8, 1954, received further and additional evidence at a hearing, and reconsidered the issue on the merits.
>
> The petitioner diligently and seasonably filed his motion for rehearing and reconsideration on the merits. This Court is continuously in session; it is not in session for a term or terms. The petitioner's motion was not filed, therefore, after a "term" of this Court had expired during which the original decision was entered.

However, the Tax Court further held on the basis of the original evidence and the additional evidence advanced at the rehearing, that it was not persuaded that it had erred in its original findings of fact and conclusions of law. (R. 139–141.) Finding additional facts based upon the additional evidence introduced at the further hearing (R. 141–144), the Tax Court held that there were deficiencies in the

identical amounts originally determined in the April 8, 1954, decisions (R. 141, 144–145).

From these decisions, entered June 30, 1955, taxpayers filed petitions for review in the court below. (R. 147.) The Court of Appeals granted the Commissioner's motion to dismiss these petitions on the ground that the Tax Court was without jurisdiction to set aside its first decisions, and that the Court of Appeals had no jurisdiction to consider petitions to review the second decisions. (R. 481.)

SUMMARY OF ARGUMENT

1. The Tax Court was without jurisdiction to vacate its decisions and grant taxpayers a rehearing after the decisions had become final under the mandate of Sections 1140 and 1142 of the Internal Revenue Code of 1939. This case does not turn on whether the Tax Court is an "agency" or a "court," for, in either event, Congress possesses the power to limit its jurisdiction. This power Congress has exercised so as to deprive the Tax Court, as well as appellate courts, of all jurisdiction further to consider a case after, under the terms of Section 1140, the Tax Court's decision has become final. The decisions of the Tax Court had become final here upon the expiration of the time allowed for filing a petition for review (Section 1140 (a)): namely, three months after the Tax Court's decisions were rendered (Section 1142).

The importance of the date when a Tax Court decision becomes final is apparent from the entire scheme of the statute, and is important in the structure of the estate and gift taxes as well as the income tax.

This date fixes the time when the Commissioner is at liberty to collect and assess and when the statute of limitations starts running. In litigation affecting the public revenue the need for certainty, finality, and expeditious disposition of tax controversies is especially plain. In order to achieve this result, Congress recognized that rules of law in some instances applicable to court procedure must be changed.

This Court has twice held that, even prior to the expiration of its terms of court, Section 1140 prevents reconsideration of its own decisions in cases coming from the Tax Court (*Helvering* v. *Northern Coal Co.*, 293 U. S. 191; *R. Simpson & Co.* v. *Commissioner*, 321 U. S. 225). Numerous decisions of the Courts of Appeals are to the same effect. There can be no question that this congressional directive, which limits the jurisdiction of the reviewing courts in cases arising from the Tax Court, likewise restricts the Tax Court itself.

Congress has allowed taxpayers to choose the forum in which to litigate tax liability, and those who choose the Tax Court obtain certain advantages, but they are also bound by corresponding limitations that apply peculiarly to that tribunal.

2. Whether final Tax Court decisions may be reopened where fraud has influenced the decision certainly need not be decided here for there is no claim of fraud. On the contrary, it is undisputed that the failure by taxpayers to file timely petitions for review was due to no fault of the Tax Court or the Commissioner. Where, as here, the Commissioner or taxpayers have asserted that failure to seek timely

review was due to lack of notice of the Tax Court's decision or because of reliance upon counsel, Section 1140 has properly been held to preclude further review. There are not present here circumstances such as mutual mistake of fact in entering into a stipulation or an alleged attempt on the part of the Commissioner to take advantage of a factual error to which he contributed. Thus, no such extraordinary situation is presented as would warrant the issuance of a writ of error *coram nobis,* even assuming that jurisdiction to issue such a writ is not prohibited by Section 1140. Indeed the circumstances here were such that the decision below may be sustained on the further ground that the Tax Court vacated its original decisions and granted rehearing only for the purpose of extending the time for appeal. Although the Court of Appeals did not base its decision upon the well-settled principle that appellate review will be denied where the rehearing below was granted solely for this purpose, nevertheless the record plainly establishes the applicability of this principle.

ARGUMENT

I

THE TAX COURT WAS WITHOUT JURISDICTION TO VACATE ITS DECISIONS AND GRANT TAXPAYERS A REHEARING AFTER THE DECISIONS HAD BECOME FINAL UNDER THE MANDATE OF SECTIONS 1140 AND 1142 OF THE INTERNAL REVENUE CODE OF 1939

Taxpayers' principal contention is that the Tax Court of the United States is a court, and not an administrative agency, and should therefore have the

power to reopen a case in the same manner and under similar circumstances as a district court would have under Rule 60 (b) of the Federal Rules of Civil Procedure.[2] (Br. 26.) Taxpayers claim that "The problem in this case is a broad one and involves the determination of the status in our judicial system of the Tax Court of the United States." (Br. 10, 15.) It is claimed further that the Court of Appeals' holding, that the Tax Court did not have the power to reopen the case, rested on its conclusion that the Tax Court is an administrative agency. (Br. 16.)

At the outset, it must be stated that the Commissioner did not argue below, nor does he argue here, that the Tax Court is an "administrative agency" and not a court. The status of the Tax Court is, in our view, immaterial to the disposition of this case. The Commissioner consistently maintained before the Tax Court (R. 112, 129, 383) and the Court of Appeals (R. 461, 473) that the Tax Court was deprived of jurisdiction, not because of its status, but because its decisions had become final under Section 1140 of the Internal Revenue Code of 1939 (Appendix, *infra*, pp. 52–54) (Section 7481 of the 1954 Code). And it was on this jurisdictional ground that the Court of

[2] Taxpayers do not, however, contend that the Tax Court's proceedings are governed by the Federal Rules of Civil Procedure. (Br. 26.) Rule 1 provides:

> *Rule 1* [as amended December 29, 1948]. *Scope of Rules.* These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. * * *

See *Katz* v. *Commissioner*, 188 F. 2d 957, 959 (C. A. 2d).

Appeals dismissed the petitions for review. While the opinion below did characterize the Tax Court as an administrative agency rather than a United States court,[3] the decision below did not rest upon this definition or upon any "status" peculiar to the Tax Court. On the contrary, as the court below recognized (R. 479–480), the result here is governed by Section 1140 of the Code, which this Court has twice held[4] precluded it from reconsidering a case after the Tax Court decision had become final under the terms of Section 1140, and which the Courts of Appeals have also repeatedly decided[5] is binding upon them as well as upon the Tax Court.

We submit that characterization of the status of the Tax Court will not resolve this controversy for, assuming it is to be considered a court[6] Congress has the

[3] The Board of Tax Appeals was created by the Revenue Act of 1924, c. 234, 43 Stat. 253, Section 900, as an "independent agency in the executive branch of the Government." This terminology is incorporated in the 1954 Code, Section 7441. See the Report of the House Ways and Means Committee, H. Rep. No. 2333, 77th Cong., 2d Sess., p. 172 (1942–2 Cum. Bull. 372, 498). For a detailed discussion of the origin and nature of the Board of Tax Appeals, see *Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716. See also *Dobson* v. *Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231.

[4] *Helvering* v. *Northern Coal Co.*, 293 U. S. 191, discussed *infra* at p. 28; *R. Simpson & Co.* v. *Commissioner*, 321 U. S. 225, discussed *infra* at p. 29.

[5] See cases cited, *infra*, p. 33, fn. 38.

[6] Despite its characterization by Congress as an "independent agency in the executive branch" (footnote 3, *supra*), the Tax Court is clearly not an administrative agency in the conventional sense. In structure and function, as well as in name, it operates as a judicial body. See *Stern* v. *Commissioner*, 215 F. 2d 701, 706

power to limit its jurisdiction,[7] and has exercised this power so as to deprive it, as well as the appellate courts, of all jurisdiction further to consider a case after the Tax Court's decision has become final.[8] This was achieved by a Congressional directive contained in Section 1140 fixing various dates or events upon which every decision of the Tax Court becomes final. Thus, early in the history of this tribunal, this Court, speak-

(C. A. 3); *Integration of the Tax Court into the Federal Judicial System*, 25 Taxes, The Tax Magazine, 445 (1947); Gribbon, *Should the Judicial Character of the Tax Court Be Recognized?* 24 Geo. Washington Law Review 619 (1956).

The Tax Court's proceedings are formal and the rules of evidence are those applicable in the courts of the District of Columbia. Section 1111 of the 1939 Code; Section 7453 of the 1954 Code.

It is believed that the Administrative Procedure Act, c. 324, 60 Stat. 237, does not apply to Tax Court proceedings. See testimony of the Attorney General before the Senate Judiciary Committee when the Act was pending before Congress. Appendix B to S. Rep. No. 752, 79th Cong., 1st Sess., p. 37, *et seq.* (S. Doc. No. 248, 79th Cong., 2d Sess., pp. 223–231, 234). But compare *Lincoln Electric Co.* v. *Commissioner*, 162 F. 2d 379, 382 (C. A. 6th).

Principles of *res judicata* and collateral estoppel are applicable in Tax Court proceedings. *Fairmont Aluminum Co.* v. *Commissioner*, 222 F. 2d 622 (C. A. 4th). See *Commissioner* v. *Sunnen*, 333 U. S. 591. For scope of review of Tax Court decisions see p. 34 *infra*, fn. 44.

[7] *Lauf* v. *E. G. Shinner & Co.*, 303 U. S. 323, 329–330; *Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 234; *Gwin* v. *United States*, 184 U. S. 669, 675; *Ex parte Robinson*, 19 Wall. 505, 511; *Ex parte McCardle*, 7 Wall. 506, 514; *Levering & Garrigues Co.* v. *Morrin*, 71 F. 2d 284, 287 (C. A. 2); *Cinderella Theater Co.* v. *Sign Writers' Local Union*, 6 F. Supp. 164 (E. D. Mich.); *Southeastern Motor Lines* v. *Hoover Truck Co.*, 34 F. Supp. 390 (M. D. Tenn.).

[8] We discuss, at pages 35–46, *infra*, the question whether jurisdiction exists to reopen final decisions predicated upon fraud or like extraordinary circumstances.

ing of the predecessor of Section 1140, said, in *Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716, 726–727:

> By § 1005, the decision of the Board is to become final in respect to all the numerous instances which in the course of the review may naturally end further litigation. In the provisions of these sections, the legislation prescribes minute details for the enforcement of the judgments that are the result of these petitions for review in the several courts vested with jurisdiction over them. The complete purpose of Congress to provide a final adjudication in such proceedings, binding all of the parties, is manifest * * *.

With respect to the case at bar, Congress not only fixed a three-month limitation after which a petition for review by a Court of Appeals might not be filed,[9] but expressly directed that upon the expiration of such period without a petition for review having been filed, the decision of the Tax Court "shall become final."[10] And Section 1140 provides for finality of

[9] Section 1142 of the 1939 Code (Appendix, *infra*, p. 54) (Section 7483 of the 1954 Code) provides that—

> The decision of the Tax Court * * * may be reviewed by a Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered * * *.

[10] Section 1140 of the 1939 Code (Section 7481 (1) of the 1954 Code), in pertinent part, reads as follows:

> The decision of the Tax Court shall become final—
>
> (a) *Petition for Review Not Filed on Time.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; * * *

Tax Court decisions with regard to every conceivable disposition on review by the appellate courts, as well as where no timely review is perfected.[11]

Thus, whether the Tax Court is to be deemed a court because it performs judicial functions is entirely beside the point, for the question is one of

[11] If a petition for review is filed on time, the finality of the decision is postponed to a later date or event depending on the disposition on review. If the Court of Appeals affirms the Tax Court's decision or dismisses the petition for review, the decision becomes final upon the expiration of the time allowed for filing a petition for certiorari if no such petition is duly filed (Section 1140 (b) (1) of the 1939 Code; Section 7481 (2) (A) of the 1954 Code), or, if duly filed, upon the denial of the petition for certiorari (Section 1140 (b) (2) of the 1939 Code; Section 7481 (2) (B) of the 1954 Code). If certiorari is granted and this Court directs that the decision of the Tax Court be affirmed or the petition for review dismissed, the decision becomes final upon the expiration of thirty days from the date of issuance by this Court of its mandate (Section 1140 (b) (3) of the 1939 Code; Section 7481 (2) (C) of the 1954 Code).

Where the Court of Appeals modifies or reverses the Tax Court's decision, and no petition for certiorari is duly filed, or the petition for certiorari is denied, or the decision of the Court of Appeals has been affirmed by this Court, the decision of the Tax Court rendered upon the Circuit Court's mandate becomes final after thirty days, unless within that period either party moves to correct it, in which event the decision becomes final when so corrected. (Section 1140 (c) (2) of the 1939 Code; Section 7481 (3) (B) of the 1954 Code.) Where the Court of Appeals remands the case to the Tax Court for a rehearing, and no petition for certiorari is duly filed, or the petition for certiorari is denied, or the decision of the Court of Appeals has been affirmed by this Court, the decision of the Tax Court rendered on the rehearing becomes final in the same manner as though there had been no prior decision. (Section 1140 (d) of the 1939 Code; Section 7481 (4) of the 1954 Code.)

If this Court modifies or reverses the Tax Court's decision, the decision rendered in accordance with this Court's mandate be-

interpreting a statute which has reference only to the Tax Court. Of course, the word "final" can have different implications, depending upon the context ~~but~~ its use;[12] but references to practices with respect to district courts are not helpful, for there is no section in Title 28 of the United States Code or in the Federal Rules of Civil Procedure comparable to the finality section of the Internal Revenue Code. Wherever "final" is used with respect to district court judgments, it is by way of comparison with interlocutory judgments or has reference to finality for purposes of appeal. See 28 U. S. C., Sections 1291, 1292; Rule 62 (a) and (c) of the Federal Rules of Civil Procedure. Rule 58 of the Federal Rules does not use the term "final" with respect to entry of judgment; nor, contrary to taxpayers' assertion (Br. 29), does Rule 73 (a) specify that the judgment becomes final thirty days after entry. Rule 73 (a) merely specifies the time allowed to appeal from a judgment of the district court. But there is no Rule which declares district court judgments final after the opportunity to appeal is exhausted or has expired. Although Rule 60 (b) allows a district court to relieve a party from "a final judgment," the notes

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comes final after thirty days, subject to the same correctional provision as in the case of a mandate of a court of appeals. (Section 1140 (c) (1) of the 1939 Code; Section 7481 (3) (A) of the 1954 Code.) If this Court remands the case to the Tax Court for a rehearing, the Tax Court's decision upon the rehearing, as in the case of a rehearing ordered by a court of appeals, becomes final as though there had been no prior decision. (Section 1140 (d) of the 1939 Code; Section 7481 (4) of the 1954 Code.)

[12] See *Brownell* v. *Tom We Shung*, 352 U. S. 180, 184–185; *Heikkila* v. *Barber*, 345 U. S. 229, 233; *Johnson* v. *Towsley*, 13 Wall. 72, 82–83.

of the Advisory Committee point out that "final" was used merely in contrast to 'interlocutory." [13]

It should be observed that Section 1140 in no way curtails the opportunity for a full review of Tax Court decisions by the appellate courts. On the contrary, the section is designed to permit the normal course of review before the decision of the Tax Court is to become final. The section is carefully drafted so that, whether or not the opportunity for full review is used, an identifiable date is ultimately reached when the decision does become final. The date of finality, falling as it does only after the opportunity for appellate review is exhausted or has expired, means, of course, that the final decision referred to in Section 1140 embodies more than the degree of finality required for purposes of appellate review.[14] As used in the context of Section 1140, it means that all jurisdiction thereafter to reconsider the case is ended. That is the construction consistently given Section 1140 by this Court [15] and the Courts of Appeals.[16]

[13] Note of Advisory Committee on Rules for Civil Procedure following Rule 60 (Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, pp. 79–83 (June 1946)).

[14] Inquiry is often had as to whether a district court judgment is final for purposes of appeal, and it is in this light that it is used in 28 U. S. C., Section 1291. That obviously is not the meaning of "final" in Section 1140, because, as noted above, Tax Court decisions which are final in the ordinary sense, *i. e.*, definitively resolving the controversy, become "final" within the meaning of Section 1140 only after the opportunity for appellate review is completely exhausted, or has expired unused.

[15] *Helvering* v. *Northern Coal Co.*, 293 U. S. 191, discussed, *infra*, at p. 28; *R. Simpson & Co.* v. *Commissioner*, 321 U. S. 225, discussed, *infra*, at p. 29.

[16] See cases cited in fn. 38, p. 33, *infra*.

As the First Circuit has stated in *Sweet* v. *Commissioner,* 120 F. 2d 77, 80–81:

> * * * [Section 1140] certainly is more than a mere cross reference to the provision elsewhere in the statute limiting the time for filing in the circuit court of appeals a petition for review.

The importance of the date when a Tax Court decision becomes final is apparent from the frequent references to finality in the procedure established by Congress for the determination and assessment of taxes. Thus, the Commissioner is required in case of a deficiency to serve a notice of deficiency upon the taxpayer and he cannot make an assessment of the deficiency until the expiration of the ninety days within which the taxpayer may commence a proceeding in the Tax Court "nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final."[17] Moreover, if the Tax Court upon redetermination finds a deficiency, the deficiency shall be assessed and paid upon notice and demand when the decision of the Tax Court "has become final."[18] Thus the Commissioner is prohibited from making an assessment, other than a jeopardy assessment,[19] or from collecting by distraint or by court proceedings, except in accordance with a decision of the Tax Court which "has become final."

[17] Section 272 (a) (1) of the 1939 Code (Appendix, *infra*, pp. 47–48); Section 6213 (a) of the 1954 Code.

[18] Section 272 (b) of the 1939 Code (Appendix, *infra*, p. 48); Section 6215 (a) of the 1954 Code.

[19] Section 273 of the 1939 Code; Section 6861 of the 1954 Code.

Even a jeopardy assessment may not be made after the decision of the Tax Court "has become final." [20]

Furthermore, the running of the statute of limitations on assessment and collection is appropriately suspended during the period in which the Commissioner is forbidden to proceed [21] and until the Tax Court decision becomes final, a like suspension of limitations is explicitly provided in the case of transferee liability.[22] Taxpayers are prohibited from suing for refund of an overpayment determined by the Tax Court until the decision of the Tax Court "has become final." [23] And Section 272 (h) [24] (Appendix, *infra*, p. 48) specifically provides that "the date on which a decision of the Tax Court becomes final shall be determined according to the provisions of section 1140." The importance of the date when the Tax Court decision becomes final in the scheme of the statute is further apparent from the similar provisions made with respect to the estate tax [25] and the

[20] Section 273 (e) of the 1939 Code (Appendix, *infra*, pp. 48–49); Section 6861 (e) of the 1954 Code.

[21] Section 277 of the 1939 Code (Appendix, *infra*, p. 49); Section 6503 (a) of the 1954 Code.

[22] Section 311 (d) of the 1939 Code; Section 6901 (f) of the 1954 Code.

[23] Section 322 (c) (1) of the 1939 Code (Appendix, *infra*, p. 49); Section 6512 of the 1954 Code. Nor is any bond required to stay assessment or collection during the period of consideration by the Tax Court, nor after the Tax Court decision and during the period before a petition for review with the Court of Appeals is filed, and if no petition for review is filed, until the decision becomes final under Section 1140 (a) of the 1939 Code. (See Section 1145 of the 1939 Code.)

[24] Section 6214 (c) of the 1954 Code.

[25] Internal Revenue Code of 1939, Sections 871 and 875.

gift tax.[26] Thus Section 1140, which specifies the circumstances under which a decision of the Tax Court becomes final, is enmeshed with and derives meaning from other sections which specify the effect of that finality and provides an element essential to the orderly functioning of the entire scheme of the statute.

The reason for such particularity as to the finality of the Tax Court's decisions was set forth in the House and Senate Committee Reports on Section 1005 of the Revenue Act of 1926[27] in substantially identical words (S. Rep. No. 52, 69th Cong., 1st Sess., p. 37 (1939–1 Cum. Bull. (Part 2) 332, 360); H. Rep. No. 1, 69th Cong., 1st Sess., p. 20 (1939–1 Cum. Bull. (Part 2) 315, 329)). The Senate Report reads, in pertinent part:

> *Date on which decision becomes final.*—Section 1005 prescribes the date on which a decision of the Board (whether or not review thereof is had) is to become final. Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during review of the Commissioner's determination, commences to run upon the day upon which the Board's decision becomes final, it is of utmost importance that this time be specified as accurately as possible. *In some instances in order to achieve this result the usual rules of law applicable in court procedure must be changed. For example, the power*

[26] Internal Revenue Code of 1939, Sections 1012 and 1017.

[27] Section 1005 of the Revenue Act of 1926, c. 27, 44 Stat. 9, was the predecessor of and contained practically identical language to that of Section 1140 of the 1939 Code, and Section 7481 of the 1954 Code.

> *of the court of review to recall its mandate is made to expire 30 days from the date of issuance of the mandate.* [Italics supplied.]

The Senate Report on the Revenue Act of 1926, *supra,* Section 274 (Internal Revenue Code of 1939, Section 272, Appendix, *infra,* p. 47), with respect to the procedure in the case of deficiencies is quite definite with respect to the desired finality. S. Rep. No. 52, 69th Cong., 1st Sess., p. 26 (1939–1 Cum. Bull. (Part 2) 332, 351). It reads as follows:

> But if he does elect to file a petition with the board his entire tax liability for the year in question (except in case of fraud) is finally and completely settled by the decision of the board when it has become final, whether the decision is by findings of fact and opinion, or by dismissal, as in case of lack of prosecution, insufficiency of evidence to sustain the petition, or on the taxpayer's own motion. The duty of the commissioner to assess the deficiency thus determined is mandatory, and no matter how meritorious a claim for abatement of the assessment or for refund he can not entertain it, nor can suit be maintained against the United States or the collector. *Finality is the end sought to be attained by these provisions of the bill, and the committee is convinced that to allow the reopening of the question of the tax for the year involved either by the taxpayer or by the commissioner (save in the sole case of fraud) would be highly undesirable.* [Italics supplied.]

In conformity with the language of this report, Section 272 (b) of the Code *requires* the Commissioner

to assess the deficiency when the decision of the Tax Court has become final, and Section 322 (c) (Appendix, *infra*, p. 49) forbids him to allow a refund except according to the decision of the Tax Court which has become final.

Taxpayers argue (Br. 29–30) that from an administrative viewpoint it would create no more uncertainty if the Tax Court could reopen than is presented because district courts have this power, and that there is no compelling reason to draw a distinction. The short answer of course is that it is for Congress to determine whether there is reason for appointing a date beyond which Tax Court decisions may not be reconsidered.

In any event, there are sound reasons behind the enactment of Section 1140, which applies only to Tax Court decisions. As was shown *supra*, at p. 23, the statute of limitations on assessments is tolled during a Tax Court proceeding, but commences to run again when the decision becomes final. And it is only after the decision is final that the Commissioner may assess the deficiency.[28] It is important to the timely collection of taxes, therefore, that the Commissioner be able to compute accurately when the statute commences to run again. This problem is not present in district court actions because the tax has already been paid and there is no statute of limitations which is tolled during a suit for refund.

Moreover, when a decision becomes final in favor of the Government, a date certain is provided when the

[28] Section 272 (a) (1) of the 1939 Code (Appendix, *infra*, p. 47); Section 6213 (a) of the 1954 Code.

United States may rely on the right to the deficiency therein determined. This Court has recognized that Congress might substantially alter normal court procedure in the interest of preserving a steady, predictable flow of revenue.[29] In this respect it may well be supposed that Congress anticipated that the bulk of the tax litigation would be handled in the Tax Court, and was thus more concerned with the finality of Tax Court decisions than of district court judgments. Statistics for the last several years indicate that Tax Court cases outnumber district court tax cases 4.2 to 1, and, more important, 17 to 1 in dollar volume.[30]

Thus it is plain that Congress had excellent reasons for declaring that when a decision of the Tax Court becomes final the case cannot thereafter be reconsidered, and in this respect Congress has clearly and unmistakably restricted the Tax Court's jurisdiction.

Accordingly, the Congressional mandate contained in Section 1140, that finality be accorded Tax Court

[29] See *Hannewinkle* v. *Georgetown*, 15 Wall. 547; *Cheatham* v. *United States*, 92 U. S. 85, 89; *State Railroad Tax Cases*, 92 U. S. 575, 613; *Shelton* v. *Platt*, 139 U. S. 591; *Dodge* v. *Osborn*, 240 U. S. 118; *Bailey* v. *George*, 259 U. S. 16; *Graham* v. *Du Pont*, 262 U. S. 234.

[30] The information in the following table is taken from the Annual Reports of the Commissioner of Internal Revenue for the Fiscal Years ended June 30, 1953, pp. 151, 152; 1954, pp. 97, 99; and 1955, pp. 112, 114:

	Number of Cases		Amount	
	Tax Court	District Courts	Tax Court	District Courts
Pending July 1, 1952	10,099	2,247	$1,350,740,325	$62,173,502
Pending July 1, 1953	12,017	2,533	1,612,501,222	76,101,055
Pending July 1, 1954	9,758	2,576	1,709,812,000	115,054,000
Pending July 1, 1955	9,243	2,351	1,892,057,000	117,059,000

decisions, has been recognized and respected by the courts. This Court in *Helvering* v. *Northern Coal Co.*, 293 U. S. 191, 193, held that "the authoritative and explicit requirement of the statute" precluded reconsideration of cases which had attained finality by virtue of Section 1005 (a) (4) of the Revenue Act of 1926, c. 27, 44 Stat. 9.[31] In the *Northern Coal Co.* case this Court had affirmed the Board's decision by an equally divided Court. 290 U. S. 591. Petitions for rehearing were denied and the mandates of the Court issued. After the decisions became final, but during the same term of court,[32] the Commissioner again petitioned for rehearing on the ground that in the meantime the Court had decided the precise question in another case in the Commissioner's favor. In a *per curiam* opinion the Court denied a rehearing because the decisions had become final under the statute. It thus appears from the decision in the *Northern Coal Co.* case that, although the judgments in that case may have been erroneous, and although the taxpayers may have received an immunity from taxation to which they were

[31] Comparable to Section 1140 (b) (3) of the 1939 Code and Section 7481 (2) (C) of the 1954 Code, declaring the decision of the Tax Court final thirty days after issuance of the mandate of the Supreme Court affirming the decision of the Tax Court.

[32] Unless limited by statute, the power of federal courts to reconsider a case during the same term is well recognized. See *Roemer* v. *Simon*, 91 U. S. 149; *Bronson* v. *Schulten*, 104 U. S. 410, 415; *D., L. and W. R. R.* v. *Rellstab*, 276 U. S. 1, 5; *Realty Co.* v. *Montgomery*, 284 U. S. 547, 549; *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U. S. 238, 244. Title 28 U. S. C. § 452, Act of June 25, 1948, c. 646, 62 Stat. 907, provides, in part, "The continued existence or expiration of a term of court in no way affects the power of the court to do any act or take any proceeding."

not entitled under the law as established by the Court at the same term, the Court nevertheless could not change the earlier judgments.[33]

If there were any doubt that the holding in the *Northern Coal Co.* case rested on lack of jurisdiction, *R. Simpson & Co.* v. *Commissioner,* 321 U. S. 225, dispelled it completely. There the taxpayer's petition for certiorari had been denied. 317 U. S. 677. After the decision became final,[34] but during the same term of court, a conflict developed, and the taxpayer's motion to file out of time a petition for rehearing[35] was granted. The petition for rehearing was granted, the order denying certiorari was vacated, and certiorari was granted. 319 U. S. 778. The Court asked counsel to discuss its jurisdiction to grant the petition for rehearing "in view of § 1140 of the Internal Revenue Code and *Helvering* v. *Northern Coal Co.,* 293 U. S. 191" (p. 227). After pointing out in its opinion that Section 1140 is designed "to determine definitely the date on which the statute of limitations, suspended during appeal, begins to run again and assessment may be made by the Commissioner" (p. 228), the Court held that (p. 230)—

> * * * when under our rules our denial [of certiorari] has become final, this statute deprives us of jurisdiction over the case.

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[33] See S. Rep. No. 52, 69th Cong., 1st sess., p. 26, quoted, *supra,* at pp. 24–25.

[34] The decision became final under Section 1140 (b) (2) upon the denial of certiorari.

[35] The twenty-five days during which a petition for rehearing as of right might have been filed under the Court's Rule 33 had expired.

> Accordingly the writ of certiorari is dismissed for want of jurisdiction.

The *Simpson* case is therefore direct authority for the Commissioner's position here. Yet taxpayers strive to find some support in the case for the proposition that "final" as used in Section 1140 "must give way to accepted Court practice" (Br. 24), and that, therefore, "the word 'final' does not deprive courts in tax cases of the usual discretionary powers that judicial tribunals possess" (Br. 25–26).[36] This conclusion is not only in error, but is the exact converse of the actual holding.

The Court's attention in the *Simpson* case was focussed on the numerous instances where, after the denial of certiorari, certiorari was later granted on a petition for rehearing filed within the twenty-five days allowed for filing a petition for rehearing as a matter of right. The problem was how the Court acquired jurisdiction to grant the petitions for rehearing in those cases inasmuch as the denial of certiorari in the first instance had the apparent effect of making the Tax Court decision final. The explanation (321 U. S., pp. 228–230) was that a denial of certiorari is "qualified" until the 25-day period allowed for filing a petition for rehearing as of right has expired.

[36] Counsel states (Br. 25, fn. 5) that the Government conceded in the *Simpson* case that a court has inherent power to reconsider a final decision of the Tax Court. But, as the portion of our brief quoted in taxpayers' brief indicates, we merely suggested that the Court's jurisdiction to hear the case might be preserved if denial of certiorari were construed to mean the ultimate action taken by the Court during the same term instead of the action on certiorari in the first instance.

In this respect it is significant that, although both parties agreed that the Court had jurisdiction, the writ of certiorari, already granted, was dismissed for lack of jurisdiction.

Therefore, in cases originating with the Tax Court, denial of certiorari does not become "final" until the 25-day period expires (p. 230).

The eventual refusal to grant the petition for rehearing in the *Simpson* case was not merely "because filed more than 25 days after the denial of the petition", as taxpayers assert. (Br. 25.) Upon the expiration of the twenty-five days, the denial of certiorari, and thus the Tax Court's decision, became final, and it was clearly for this reason that the Court dismissed the writ of certiorari, not as a matter of discretion, but because the Court lacked jurisdiction.[36a]

The holding in *Wayne Gas Co.* v. *Owens Co.*, 300 U. S. 131, that a bankruptcy court in a reorganization proceeding has power in its sound discretion to reopen an order dismissing the reorganization petition, notwithstanding that the time allowed for appeal from the order has expired, is inapplicable here. The reasoning of this Court (p. 137) shows that the rule would have been different, if the statute there had contained a provision similar to Internal Revenue Code Section 1140, as, indeed, this Court's decisions in the *Northern Coal Co.* and the *Simpson & Co.* cases demonstrate. As the court below noted, the *Simpson* case was decided seven years after the *Wayne Gas* case. (R. 480–481.)

Moreover, the fact that the Tax Court, like the

[36a] See also *Denholm & McKay Co.* v. *Commissioner*, 132 F. 2d 243 (C. A. 1st) holding that, although a petition for rehearing timely filed with the Board operates to postpone the running of the time for filing a petition for court review until the Board has disposed of the petition for rehearing, a petition for rehearing filed after the time prescribed by the Rules of the Board must be acted upon within the three-month period provided for in § 1140 for thereafter the Board is deprived of jurisdiction by that statute.

bankruptcy court in the *Wayne Gas* case, has no "term" and that therefore the Tax Court may not be said to have vacated its decisions "out of term" (R. 139) is, in view of Section 1140, entirely immaterial. In the *Northern Coal Co.* and *Simpson* cases this Court held that Section 1140 deprived it of jurisdiction even within the term.

The *Northern Coal* and *Simpson* decisions show that when a decision of the Tax Court becomes final Section 1140 deprives the Supreme Court of jurisdiction further to consider the case. With all the more reason it would seem that the section constitutes a limitation upon the power of the Tax Court to vacate its own decision after it has become final.[37] It is

[37] Significantly, a majority of the judges of the Tax Court have in the past agreed that "final," as used in Section 1140, deprives the Tax Court of jurisdiction thereafter to reconsider the case. The motion to reopen after the decision became final, in *La Floridienne J. Buttgenbach & Co.* v. *Commissioner*, B. T. A. Docket No. 15480 (not reported), discussed *infra* at p. 39, was reviewed by the Board and denied for lack of jurisdiction. In the memorandum accompanying the order denying the motion in *McCarthy* v. *Commissioner* (Tax Court order not reported; see Seventh Circuit opinion, 139 F. 2d 20, 21), Judge Murdock, the present Chief Judge of the Tax Court, stated that "This Court is without jurisdiction to vacate the decision which has now become final under the statute and to reopen the proceeding." Again in *J. S. Rippel & Co.* v. *Commissioner*, 36 B. T. A. 789, the Board itself held that (p. 790)—

> It is well settled that the Board is a tribunal of limited authority and jurisdiction, and where the statute provides that our decisions shall, under certain circumstances, become final, we have no power to reopen and change them when such finality has taken place.

And in the following cases it was assumed by the Courts of Appeals that the Board, or Tax Court, had denied the motion for want of jurisdiction: *White's Will* v. *Commissioner*, 142 F. 2d 746 (C. A. 3d); *Monjar* v. *Commissioner*, 140 F. 2d 263 (C. A. 2d).

obvious from the detailed nature of Section 1140 (see fn. 11, p. 19, *supra*) that the effect of finality must be the same for each possible situation therein described, and that "final" is meant to apply to the lower courts and the Tax Court in the same manner and with the same force as to the Supreme Court. Therefore, neither the Courts of Appeals nor the Tax Court can reassume jurisdiction once the decision of the Tax Court has become final, and in numerous Courts of Appeals decisions this lack of jurisdiction has been recognized.[38]

The fact that the right to reopen a decision out of time may vary, depending upon whether the action is in the district court or the Tax Court, presents nothing novel to the tax law. Rights far more substantial than the one claimed here turn on the forum chosen by the taxpayer to litigate his tax liability. For example: suits for refund of taxes in a district court may be tried before a jury as a matter of right,[39] whereas there is no right to a jury trial in

[38] *Sweet* v. *Commissioner*, 120 F. 2d 77 (C. A. 1st); *Denholm & McKay Co.* v. *Commissioner*, 132 F. 2d 243 (C. A. 1st); *Monjar* v. *Commissioner*, 140 F. 2d 263 (C. A. 2d); *White's Will* v. *Commissioner*, 142 F. 2d 746 (C. A. 3d); *Commissioner* v. *Realty Operators*, 118 F. 2d 286 (C. A. 5th); *McCarthy* v. *Commissioner*, 139 F. 2d 20 (C. A. 7th); *Swall* v. *Commissioner*, 122 F. 2d 324 (C. A. 9th), certiorari denied, 314 U. S. 697; *Crews* v. *Commissioner*, 120 F. 2d 749 (C. A. 10th), certiorari denied, 314 U. S. 664. Compare *Reo Motors* v. *Commissioner*, 219 F. 2d 610 (C. A. 6th); and *La Floridienne J. Buttgenbach & Co.* v. *Commissioner*, 63 F. 2d 630 (C. A. 5th), discussed (*infra*, pp. 39–42). See also *Lentin* v. *Commissioner*, 237 F. 2d 5 (C. A. 7th).

[39] 28 U. S. C., Sec. 2402; Act of July 16, 1952, c. 892, 66 Stat. 735, Sec. 3.

the Tax Court;[40] equitable recoupment in tax cases, if available at all as a judicial remedy,[41] may be resorted to only in district court actions,[42] not in Tax Court proceedings.[43]

The scope of review on appeal of Tax Court cases was for years substantially more limited than the scope of review of district court tax cases.[44]

There are also disadvantages in litigating tax cases in the district courts. The proposed deficiency must be paid in advance. The time within which to appeal is sixty days in district court actions,[45] whereas three months are allowed in Tax Court proceedings.[46]

Clearly, therefore, a taxpayer's rights may be substantially different, depending on where the litigation is brought. The point is that Congress has allowed taxpayers to choose the forum in which to litigate tax liability. These taxpayers have chosen the Tax Court with its corresponding advantages, and they are bound by any disadvantages that may be involved.

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[40] See Secs. 1100–1146 of the 1939 Code.

[41] See *McEachern* v. *Rose*, 302 U. S. 56. Compare Sec. 3801 of the 1939 Code.

[42] *Bull* v. *United States*, 295 U. S. 247.

[43] *Commissioner* v. *Gooch Co.*, 320 U. S. 418.

[44] The rule of *Dobson* v. *Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231, was modified by statute, Act of June 25, 1948, c. 646, 62 Stat. 869, Section 36, amending Section 1141 (a) of the 1939 Code, now Section 7482 of the 1954 Code, so that Tax Court decisions are now reviewable "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury."

[45] Rule 73 (a), Federal Rules of Civil Procedure.

[46] § 1142 of the 1939 Code.

II

EVEN IF IT BE ASSUMED THAT IN CASES OF FRAUD OR LIKE EXTRAORDINARY CIRCUMSTANCES JURISDICTION TO REOPEN A FINAL TAX COURT DECISION EXISTS DESPITE SECTION 1140, NO SUCH CIRCUMSTANCES WERE PRESENT HERE

Section 1140 is by its terms absolute and reflects a determination by Congress that the need for ultimate finality in Tax Court cases outweighs any occasional hardship which may result from precluding further consideration of past decisions. However, we recognize that unique considerations are operative where a decision is based upon fraud [47] and emphasize that the Court is not called upon in this case to determine whether such a decision may be reopened after the interval specified in Section 1140.[48]

There is no claim here of fraud. Indeed it is plain that taxpayers' failure to recognize that the time to file petitions for review was running was due to no fault of the Tax Court or the Commissioner.[49]

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[47] It has been held that where fraud has influenced a decision, more than an injury to a private party is involved; the wrong is against the institutions set up to protect society. See *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U. S. 238; *Simon* v. *Southern Railway*, 236 U. S. 115; *United States* v. *Throckmorton*, 98 U. S. 61.

[48] Section 272 (f) of the 1939 Code (Section 6212 (c) (1) of the 1954 Code), treating of the procedure in the case of deficiencies, denies to the Commissioner the right to determine an additional deficiency with respect to the same taxable year "except in the case of fraud" (and except for his assertion of increased deficiencies before the Tax Court (Section 272 (e)) or for jeopardy assessments) once the taxpayer has filed a petition with the Tax Court. See also S. Rep. No. 52, 69th Cong., 1st Sess., p. 26, *supra*, p. 25.

[49] Cf. *Nelson* v. *New York City*, 352 U. S. 103, 108.

A copy of each of the decisions of April 8, 1954, actually was served by registered mail upon the first counsel of record for the taxpayers. (R. 102–103, 114.) Apparently it is the practice of the Tax Court to serve copies of decisions and under its rules where a party is represented by more than one counsel service is made only upon counsel whose appearance was first entered of record.[50]

Unfortunately the copy of the decision did not actually come to the attention of the proper parties in the office of taxpayers' counsel until after the expiration of the three-months period (R. 102–103, 114). However, no explanation appears for the failure of counsel or associate counsel to recognize from the explicit direction in the opinion that "Decisions will be entered for the respondent" (R. 92), that the decisions would be entered forthwith as no computation under Rule 50 was requisite.[51] Indeed, since the opinion also expressly declared (R. 92) that "The

[50] Rules of Practice before the Tax Court (Rev. November, 1952):

RULE 22.—SERVICE

* * * * *

(b) Upon first counsel of record.—Service upon any counsel of record will be deemed service upon the party, but, where there are more than one, service will be made only upon counsel for petitioner whose appearance was first entered of record—unless the first counsel of record, by writing filed with the Court, designates other counsel to receive service, in which event service will be so made.

[51] For an exposition by the Tax Court judge of the practices of the Tax Court, with respect to the entry and service of opinions and decisions, see R. 376–381.

respondent's determination is sustained", it was further apparent that the Commissioner's determination, as stated in the deficiency notice, was sustained, and no further computation was necessary. Entry of the decisions under this opinion was clearly a *pro forma* matter.

In particular, it is significant that counsel made no inquiry of the Tax Court about the status of the proceeding until July 20, 1954, after the expiration of the three-months period (R. 102, 104–105), although they knew of the findings of fact and opinion as early as April 14. (R. 95–96, 101.) See pp. 4–5, *supra*. The present counsel for taxpayers admitted at the hearing on the motion to vacate, in response to a question by the Tax Court judge, that he was unable to explain why the Clerk of the Tax Court had not previously been asked about the entry of the decisions. (R. 126–128.) See pp. 5–6, *supra*.

In any event, the statute nowhere makes limitation of the time for filing a petition for review or for fixing the date of finality of the Tax Court decision depend upon service of a decision or notice to taxpayer or his counsel of entry of decision. Section 1142 confers jurisdiction to review a Tax Court decision on a Court of Appeals, if a petition for such review is filed by either the Commissioner or taxpayer "within three months after the decision is *rendered*."[52] [Italics supplied.] Section 1140, pre-

[52] A decision is "held to be rendered upon the date that an order specifying the amount of the deficiency is entered" (Section 1117 (c), Appendix, *infra*, p. 51), here April 8, 1954. (R. 92–93.)

scribing when a Tax Court decision becomes final insofar as here pertinent, provides that the decision shall become final upon "the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time * * *". Notwithstanding the practice of the Tax Court to serve the first counsel of record with a copy of a decision and the circumstance that such service actually here occurred, the limitation on time for review is in no sense conditioned upon such service or notice to counsel; the statute clearly fixes the date from the actual rendition of the decision.

In cases like the present one, where either the Commissioner or the taxpayers[53] have asserted that failure to seek relief within the period prescribed by Sections 1140 and 1142 of the Internal Revenue Code (Appendix, *infra*, pp. 52–54) was due to failure to receive notice of the Tax Court's decision or because of reliance upon counsel, it has been held that the Tax Court was without jurisdiction over its decision after it had become final under the statute. *Commissioner* v. *Realty Operators*, 118 F. 2d 286 (C. A. 5th); *Swall* v. *Commissioner*, 122 F. 2d 324 (C. A. 9th), certiorari denied, 314 U. S. 697; *McCarthy* v. *Commissioner*, 139 F. 2d 20 (C. A. 7th); *Monjar* v. *Commissioner*, 140 F. 2d 263 (C. A. 2d). And, while it is apparent that there can be no claim here that fraud or other extraordinary circumstances warranted reopening the

[53] Section 1140 has, of course, been applied against the Commissioner as well as against taxpayers. *Helvering* v. *Northern Coal Co.*, 293 U. S. 191; *Commissioner* v. *Realty Operators*, 118 F. 2d 286 (C. A. 5th); *Denholm & McKay Co.* v. *Commissioner*, 132 F. 2d 243 (C. A. 1st).

Tax Court decisions, it should be noted that in the two cases where "final" Tax Court decisions were reopened, such factors were present. In *La Floridienne J. Buttgenbach & Co.* v. *Commissioner,* 63 F. 2d 630 (C. A. 5th), taxpayer, an alien corporation, was represented by "a layman inexperienced in tax matters" who, after conferring with an agent of the Bureau of Internal Revenue in charge of the case, entered into a stipulation which the Commissioner later conceded embodied a mutual mistake. Although a decision of the Board of Tax Appeals predicated upon this stipulation had become final under Section 1005,[54] the Court of Appeals for the Fifth Circuit vacated the order of the Board, writing at p. 631:

> * * * We rest here upon two extraordinary circumstances. The first is that the order to be vacated is not really a judgment of the Board representing its ascertainment of facts and application of the law to them, but is the agreement of the parties put into the form of a judgment, the order so reciting. The Board itself has on the face of its record never ascertained what, if any, taxes the taxpayer owed. The second circumstance is that both parties to the agreement are saying that the stipulation behind the order rests on a false and mistaken basis, and, if the order stands, it operates as a fraud arising out of the confidence that the inexperience of one party put in the knowledge and experience of the other. However unintended the advantage taken of the taxpayer, the Commissioner does not wish to retain it.

[54] See footnote 27, *supra*, p. 24.

Although the court's action in *Buttgenbach* in vacating the Board's order is doubtless in part attributable to the willingness of both parties to have the Board assume jurisdiction and correct its prior decision, the correctness of this result is subject to serious doubt, for, as the Court of Appeals in the instant case noted (R. 480):

> Though parties may stipulate to the jurisdiction of the *person,* they may not do so as to the *subject matter.*

The court below also noted (R. 480) that the *Buttgenbach* case was decided before the *Northern Coal Co.* decision of this Court. Compare the later decision of the Fifth Circuit in *Commissioner* v. *Realty Operators, supra.*[55] Apart from this, it is apparent that the only principle that can be derived from *Buttgenbach*, even if it be assumed *arguendo* that the decision has any present validity, is that an exception to Section 1140 finality may exist where fraud, or circumstances closely analogous to fraud, influenced the decision.

This too is all that may be derived from the decision of the Sixth Circuit in *Reo Motors* v. *Commissioner,* 219 F. 2d 610. Like *Buttgenbach, Reo* involved a stipulation. There the Commissioner and taxpayer had stipulated that the Commissioner's computation of taxpayer's excess profits credit was cor-

[55] It may be added that the *Buttgenbach* case has been questioned or distinguished by several other circuits. *Sweet* v. *Commissioner,* 120 F. 2d 77, 81 (C. A. 1st); *Monjar* v. *Commissioner,* 140 F. 2d 263, 265 (C. A. 2d); *White's Will* v. *Commissioner,* 142 F. 2d 746, 748, 749 (C. A. 3d). And in *Swall* v. *Commissioner,* 122 F. 2d 324, 325, the Ninth Circuit considered that the *Buttgenbach* case was in effect overruled by the *Northern Coal Co.* case.

rect. In its application for extraordinary relief, taxpayer alleged (p. 611) that:

> because of a mutual mistake of fact, an error had been made in the stipulation of its excess profits credit resulting from the omission from its invested capital of more than two million dollars paid in for stock; that if the correct excess profits credit had been used there would have been no deficiency in petitioner's excess profits tax for 1942; that the Commissioner had admitted this error in connection with another proceeding involving petitioner's excess profits tax liability for 1943; * * *

The Tax Court summarily denied taxpayer's application for relief and the Sixth Circuit reversed, holding that the Tax Court has power in extraordinary circumstances to vacate and correct its decisions, even after these have become final. This power, the court held, was similar to the jurisdiction of a court to grant a writ of error *coram nobis* and in remanding to the Tax Court, the Sixth Circuit expressed no view as to whether the circumstances in the case were so extraordinary as to invite the exercise of that power. Again, whether or not the *Reo* case was correctly decided, the circumstances there of mutual mistake of fact in entering into a stipulation upon which the decision of the Tax Court had allegedly been based, were certainly entirely different from the facts here.

Indeed, in the *Reo Motors* case the taxpayer additionally alleged (p. 611):

> that in 1949 the petitioner had sought relief from its excess profits tax for the year 1942

> under § 722 of the Internal Revenue Code of 1939, 26 U. S. C. § 722, in response to which the Commissioner had contended that no § 722 relief could be given because the allowance of the petitioner's proper credits would result in no excess profits tax liability for the year 1942, making inapplicable the relief provisions of § 722.

The court therefore noted (p. 612) that:

> The petitioner points out that the Commissioner not only concedes this factual error, but is seeking to take advantage of it to the detriment of the petitioner in resisting petitioner's claim under § 722.

By contrast here the Commissioner was not at all at fault and was in no sense a party to the error or inadvertence.

United States v. *Morgan*, 346 U. S. 502, and *United States* v. *Mayer*, 235 U. S. 55, which discuss the circumstances under which a court may grant a writ of error *coram nobis*, show that even if the Tax Court has power to grant such writs, no extraordinary situation calling for issuance of the writ is presented here.[56] By contrast, all that the Tax Court here asserted as the ground for exercise of power to grant "extraordinary relief" (R. 138) was

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[56] In the *Mayer* case, this said (p. 69):

> This [*coram nobis*] jurisdiction was of limited scope; the power of the court thus to vacate its judgments for errors of fact existed, as already stated, in those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid.

See also *United States* v. *Morgan*, 346 U. S. at 507, fn. 9.

"to enable the petitioner to present new and additional evidence" and to enable the court to reconsider the issue to determine whether it had made any erroneous findings or legal conclusions. These bore no resemblance to possible "fundamental" errors, affecting the regularity and validity of the entire proceeding—*e. g.*, the failure without competent waiver to furnish the defendant in a criminal case with counsel—such as justify the grant of *coram nobis*.

Indeed, the events which prompted the rehearing here were not only outside the scope of any exception to finality which may exist in cases of fraud or other extraordinary circumstances, but they were such as to warrant affirmance of the dismissal of the petitions for review on still another ground. In *Wayne Gas Co.* v. *Owens Co.*, 300 U. S. 131, 137, this Court pointed out that "[w]here it appears that a rehearing has been granted only for th[e] purpose [of extending the time for appeal] the appeal must be dismissed." This statement was quoted in *Commissioner* v. *Realty Operators*, 118 F. 2d 286, 289, and applied by the Fifth Circuit against the Commissioner and his petition for review of a Board decision was dismissed. Although the court below did not base its decision upon this principle, nevertheless, the record establishes that it has application here.

Taxpayers' original motion filed on August 24, 1954 (R. 93–94), was simply to vacate the decisions entered on April 8, 1954 (R. 94). At the full hearing, which was held on this motion on September 14 and 16, 1954

(R. 106–133), there was no suggestion that a further hearing on the merits was necessary to enable taxpayers to present new and additional evidence; substantially all that was discussed were the circumstances under which the time to file petitions for review had been permitted to lapse and the extent of the Tax Court's power nevertheless to afford an opportunity for appeal (R. 108, 111, 119–120). Indeed, it was not until October 11, 1954, that the suggestion first was made that the Tax Court should vacate the April decisions for the purpose of granting taxpayers a rehearing on the merits and that the original motion to vacate filed in August be amended by adding a request for a rehearing. (R. 133, 134.) If taxpayers believed that the justice of their cause required the taking of additional evidence on the merits, which was the nominal reason for vacating the decisions and for the rehearing, it is not explained why they waited for approximately six months after receiving the Tax Court's findings and opinion before even suggesting to the Tax Court the need for a rehearing; nor is it explained why in the original motion to vacate, and in the course of the discussion at the hearing on that motion, no relief by way of opportunity to adduce additional evidence on the merits was sought. Concededly, taxpayers at all times were aware of the Tax Court's findings and opinion. There was no requirement that taxpayers await the Tax Court's decisions before moving for rehearing, if in fact the alleged extraordinary need existed for adducing additional evidence. On the contrary, the Tax

Court's rules provided (Rule 19 (e) (Rev. November, 1952)) that "No motion for rehearing, further hearing, or reconsideration may, except by special leave, be filed more than 30 days after the *opinion* has been served * * *."[57] [Italics supplied.]

Moreover, the record shows that at the conference of April 14, 1954, attended by taxpayer Jesse Lasky and his attorneys, there was no suggestion of a need, extraordinary or otherwise, to adduce additional evidence. (R. 96, 99, 101–102, 103–104.) Further, the showing made to the Tax Court was not such as would justify even granting a new trial on the basis of newly discovered evidence—had the motion been timely—for the evidence offered (R. 484–486) was merely cumulative and was not such as by due diligence could not have been adduced at the original hearing (R. 138–144).

The inference seems compelling that the October 11, 1954, amendment to the August motion to vacate "for the purpose of granting petitioners a rehearing of the case on its merits" (R. 134) was an afterthought for the purpose of extending the time for appeal and that the rehearing was granted solely to extend the time for appeal. (See R. 375, 381–384.)

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[57] Similarly Rule 19 (e) provided that no motion to vacate a decision might, except by special leave, be filed more than thirty days after the decision had been entered. The Tax Court has, of course, for reasons stated in point I, *supra*, no jurisdiction to grant such special leave after the 30-day period for filing a motion to vacate has expired, and its decision has become final under the terms of Section 1140. See *Denholm & McKay Co.* v. *Commissioner*, 132 F. 2d 243 (C. A. 1st).

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1939:

SEC. 272. PROCEDURE IN GENERAL.

(a) (1) [1] [as amended by the Act of December 29, 1945, c. 652, 59 Stat. 669, Sec 203] *Petition to Tax Court.*—[2] If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-

[1] Internal Revenue Code of 1954, Section 6212 (a) and 6213 (a) (26 U. S. C. 1952 ed., Supp. II, Secs. 6212 (a), 6213 (a)), contain the substance of this section.

[2] Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 504. CHANGE OF NAME OF BOARD OF TAX APPEALS.

* * * * *

(c) *References.*—All references in any statute (except this section), or in any rule, regulation, or order, to the "Board of Tax Appeals" or to the "Board" when used in the sense of "Board of Tax Appeals", or to the "member", "members", or "chairman" thereof shall be considered to be made to The Tax Court of the United States, the judge, judges, and presiding judge thereof, respectively.

day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653 (a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

* * * * *

(b)[3] *Collection of Deficiency Found by Tax Court.*—If the taxpayer files a petition with the Tax Court, the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Tax Court which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

* * * * *

(h)[4] *Final Decisions of Tax Court.*—For the purposes of this chapter the date on which a decision of the Tax Court becomes final shall be determined according to the provisions of section 1140.

* * * * *

(26 U. S. C. 1952 ed., Sec. 272.)

SEC. 273. JEOPARDY ASSESSMENTS.

* * * * *

(e)[5] *Expiration of Right to Assess.*—A jeopardy assessment may not be made after the de-

[3] Internal Revenue Code of 1954, Section 6215 (a) (26 U. S. C. 1952 ed., Supp. II, Sec. 6215 (a)), is substantially the same.

[4] Internal Revenue Code of 1954, Section 6214 (c) (26 U. S. C., 1952 ed., Supp. II, Sec. 6214 (c)), is substantially the same.

[5] Internal Revenue Code of 1954, Sec. 6861 (e) (26 U. S. C. 1952 ed., Supp. II, Sec. 6861 (e)), is substantially the same.

cision of the Tax Court has become final or after the taxpayer has filed a petition for review of the decision of the Tax Court.

* * * * *

(26 U. S. C. 1952 ed., Sec. 273.)

SEC. 277.[6] SUSPENSION OF RUNNING OF STATUTE.

The running of the statute of limitations provided in section 275 or 276 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under section 272 (a)) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for sixty days thereafter.

(26 U. S. C. 1952 ed., Sec. 277.)

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(c)[7] *Effect of Petition to Tax Court.*—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272 (a) and if the taxpayer files a petition with the Tax Court within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Tax Court which has become final; and

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[6] Internal Revenue Code of 1954, Sec. 6503 (a) (1) (26 U. S. C. 1952 ed., Supp. II, Sec. 6503 (a) (1)), is substantially the same.

[7] Internal Revenue Code of 1954, Sec. 6512 (a) (26 U. S. C. 1952 ed., Supp. II, Sec. 6512 (a)), is substantially the same.

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Tax Court which has become final; and

(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Tax Court which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

* * * * *

(26 U. S. C. 1952 ed., Sec. 322.)

SEC. 1100 [8] [As amended by Sec. 504 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. STATUS.

The Board of Tax Appeals (hereinafter referred to as the "Board") shall be continued as an independent agency in the Executive Branch of the Government. The Board shall be known as The Tax Court of the United States and the members thereof shall be known as the presiding judge and the judges of The Tax Court of the United States.

(26 U. S. C. 1952 ed., Sec. 1100.)

SEC. 1113. [9] SERVICE OF PROCESS.

The mailing by registered mail of any pleading, decision, order, notice, or process in respect of proceedings before the Tax Court shall be held sufficient service of such pleading, decision, order, notice, or process.

(26 U. S. C. 1952 ed., Sec. 1113.)

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[8] Internal Revenue Code of 1954, Sec. 7441 (26 U. S. C. 1952 ed., Supp. II, Sec. 7441), is substantially the same.

[9] Internal Revenue Code of 1954, Sec. 7455 (26 U. S. C. 1952 ed., Supp. II, Sec. 7455), is substantially the same.

SEC. 1117.[30] REPORTS AND DECISIONS.

(a) *Requirement.*—A report upon any proceeding instituted before the Tax Court and a decision thereon shall be made as quickly as practicable. The decision shall be made by a member in accordance with the report of the Tax Court, and such decision so made shall, when entered, be the decision of the Tax Court.

(b) *Inclusion of Findings of Fact or Opinions in Report.*—It shall be the duty of the Tax Court and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Tax Court shall report in writing all its findings of fact, opinions and memorandum opinions.

(c) *Date of Decision.*—A decision of the Tax Court (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Tax Court. If the Tax Court dismisses a proceeding for reasons other than lack of jurisdiction and is unable from the record to determine the amount of the deficiency determined by the Commissioner, or if the Tax Court dismisses a proceeding for lack of jurisdiction, an order to that effect shall be entered in the records of the Tax Court, and the decision of the Tax Court shall be held to be rendered upon the date of such entry.

* * * * *

(26 U. S. C. 1952 ed., Sec. 1117.)

[30] Internal Revenue Code of 1954, Sec. 7459 (a), (b) and (c) (26 U. S. C. 1952 ed., Supp. II, Sec. 7459 (a), (b) and (c)), is substantially the same.

SEC. 1140.[11] DATE WHEN TAX COURT DECISION BECOMES FINAL.

The decision of the Tax Court shall become final—

(a) *Petition for Review Not Filed on Time.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(b) *Decision Affirmed or Petition for Review Dismissed.*—

(1) *Petition for certiorari not filed on time.*—Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Tax Court has been affirmed or the petition for review dismissed by the Circuit Court of Appeals and no petition for certiorari has been duly filed; or

(2) *Petition for certiorari denied.*—Upon the denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

(3) *After mandate of Supreme Court.*—Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Tax Court be affirmed or the petition for review dismissed.

(c) *Decision Modified or Reversed.*—

(1) *Upon mandate of Supreme Court.*—If the Supreme Court directs that the decision of the Tax Court be modified or reversed, the decision of the Tax Court rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the man-

[11] Internal Revenue Code of 1954, Sec. 7481 (26 U. S. C. 1952 ed., Supp. II, Sec. 7481), is substantially the same.

date, in which event the decision of the Tax Court shall become final when so corrected.

(2) *Upon mandate of the Circuit Court of Appeals.*—If the decision of the Tax Court is modified or reversed by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Tax Court rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Tax Court was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Tax Court shall become final when so corrected.

(d) *Rehearing.*—If the Supreme Court orders a rehearing; or if the case is remanded by the Circuit Court of Appeals to the Tax Court for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Tax Court rendered upon such rehearing shall become final in the same manner as though no prior decision of the Tax Court had been rendered.

(e) *Definitions.*—As used in this section.—

(1) *Circuit Court of Appeals.*—The term "Circuit Court of Appeals" includes the United States Court of Appeals for the District of Columbia;

(2) *Mandate.*—The term "mandate," in case a mandate has been recalled prior to the ex-

piration of 30 days from the date of issuance thereof, means the final mandate.

(26 U. S. C., 1952 ed., Sec. 1140.)

SEC. 1142.[12] PETITION FOR REVIEW.

The decision of the Tax Court rendered after February 26, 1926 (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318 of the Revenue Act of 1926, 44 Stat. 65, 83, relating to hearings before the Tax Court prior to February 26, 1926) may be reviewed by a Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered, or, in the case of a decision rendered on or before June 6, 1932, within six months after the decision is rendered.

(26 U. S. C. 1952 ed., Sec. 1142.)

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[12] Internal Revenue Code of 1954, Section 7483, reads as follows:

SEC. 7483. PETITION FOR REVIEW.

The decision of the Tax Court may be reviewed by a United States Court of Appeals as provided in section 7482 if a petition for such review is filed by either the Secretary (or his delegate) or the taxpayer within 3 months after the decision is rendered. If, however, a petition for such review is so filed by one party to the proceeding, a petition for review of the decision of the Tax Court may be filed by any other party to the proceeding within 4 months after such decision is rendered.

(26 U. S. C. 1952 ed., Supp. II, Sec. 7483).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 371

BESSIE LASKY AND JESSE L. LASKY, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

The Brief for Respondent points out that Lasky has been deprived of his right of appeal due to oversight or mistake of counsel and through no fault of his own. As a result, all his property, including his home, is tied up by tax liens. This property is not sufficient to pay the tax claim determined by the Tax Court. His case is meritorious and he should have a reasonable chance of prevailing if heard on the merits on

appeal. He is now 76 years old. Justice demands that he be given the right to prosecute his appeal before he is stripped of all his wordly goods. The cases cited herein and in petitioners' original brief show that this Court has the power to reverse. It should exercise that power.

This is a case of first impression, so far as this Court is concerned. It has never passed upon the power of the Tax Court, as a trial court, to vacate a decision out of time for cause shown.

The original Brief of the petitioners demonstrates that the Tax Court is a Court. The Government admits this is so, stating: "* * * the Tax Court is clearly not an administrative agency in the conventional sense. In structure and function, as well as in name, it operates as a judicial body." (Brief for Respondent, p. 16) As a Court, it should be permitted, within its discretion, to grant rehearings, or take other action within the province of a trial court in order to accomplish justice.

Petitioners feel that trial courts have broad discretionary power in situations such as the one here involved. The modern trend is illustrated by Rule 60 (b), Federal Rules of Civil Procedure. (Original Brief, p. 26)

This Court has taken a liberal view in interpreting Rule 60 (b), as is illustrated by *Klapprott* v. *United States*, 335 U.S. 601. In that case, it is said (p. 614-615): "In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to

enable them to vacate judgments whenever such action is appropriate to accomplish justice."

Lower courts have interpreted the "excusable neglect" clause to cover situations where action, or failure to act, by counsel resulted in injustice to the client. Thus, in *Barber* v. *Turberville* (App. D.C. 1954), 218 F. (2d) 34, counsel for defendant failed to file an answer "because the complaint became mixed with another file." The Court of Appeals said this was excusable neglect and set aside the default judgment. The many cases cited under Rule 60 (b), U.S.C.A. show a liberal construction. This is well expressed in *Standard Grate Bar Co.* v. *Defense Plant Corporation* (D.C. Pa. 1944), 3 F.R.D. 371, as follows:

> "* * * Powers vested in the trial courts by Rule 60 (b) should be liberally exercised in order that cases may be disposed of upon their merits, and parties claiming in good faith to have a substantial defense to an action should be given an opportunity to present it."

The Government's Brief is predicated primarily upon the contention that the literal language of the statute must be followed. It says that this Court has no power to follow the established rules of judicial construction and to interpret the word "final" in the light of such rules. This position is taken despite repeated decisions of this Court and other Courts which deviate from the literal language of statutes and exercise discretionary power.

Typical of the many cases involving the inherent discretionary power of a Court to interpret a jurisdictional statute and deviate from literal language is

United States v. *California Eastern Line, Inc.,* (1955) 348 U.S. 351. The Renegotiation Act of 1942 provides that Tax Court determinations of excess profits "shall not be reviewed or redetermined by any court or agency." Despite this specific language, this Court, on the urging of the Government, reversed the decision of the Court of Appeals for the District of Columbia, which had held that it lacked jurisdiction to review a Tax Court decision holding that California Eastern Line had no renegotiable contract.

The Ninth Circuit in *Helms Bakeries* v. *Commissioner,* (1956) 236 F. (2d) 3, accepted jurisdiction and remanded an excess profits tax relief case under § 722 (b) (4), Internal Revenue Code of 1939, to the Tax Court, despite the provision in § 732 (c) of that Code which states that Tax Court decisions in such cases shall not be reviewed or redetermined by any court or agency except the Tax Court. The reasoning of the Ninth Circuit was that the decision of the Tax Court was contrary to its findings of fact and that the Tax Court had made no finding on a material issue.

Another decision of this Court, closely akin to the case at bar, is *Industrial Addition Association* v. *Commissioner,* (1945) 323 U.S. 310. In that case, the taxpayer had filed no tax return. It lost before the Tax Court and appealed to the Sixth Circuit when, under the statute, it should have appealed to the Court of Appeals for the District of Columbia. After the three-month period for appeal had expired, the parties stipulated that the case be heard by the Sixth Circuit. The Court of Appeals dismissed the case for lack of jurisdiction (141 F. (2d) 636) reasoning that no proper

petition for review had been filed within the three-month period and that the parties, by stipulation, could not, after the lapse of the three-month appeal period, stipulate venue. This Court reversed.

Other illustrations of a Court's power to disregard literal language are legion. For instance, *Dickinson* v. *United States,* (1953) 346 U.S. 389, involved the construction of the Universal Military Training and Service Act. That Act provides that classification orders of Draft Boards shall be "final". Despite this limitation on review, this Court actually did review the facts and reversed the Court of Appeals which had decided it lacked jurisdiction.

The purpose of citing the above cases is to demonstrate that, in situations where courts are specifically denied jurisdiction to exercise any review, a way to do substantial justice and to grant reviews has been found in meritorious cases. It would seem that the rule should be less harsh where appellate review with time limitations is specifically provided, than in the cases cited where all review is denied by statute.

A case involving the power of a Court to grant appellate review when the time for appeal had expired, is *Hill* v. *Hawes,* (1944) 320 U.S. 520. In that case, the United States District Court for the District of Columbia filed a judgment dismissing the complaint. The Clerk noted the judgment in the docket. The Rules of Civil Procedure imposed on the Clerk the duty, immediately upon the entry of the judgment, to send notice of such entry, but he did not do so. After the period for appeal had expired, the petitioner filed a motion with the District Court asking it to enter

judgment and to direct the Clerk to notify the parties. The District Court vacated the first judgment and entered a new judgment, with instructions that the Clerk notify the parties. Appeal was taken from the second judgment. The Court of Appeals for the District of Columbia dismissed the appeal for lack of jurisdiction. This Court reversed. The Court pointed out that the "term had not expired and the judgment was still within the control of the trial judge for such action as was in the interest of justice to a party to the cause."

There are innumerable cases in which courts have followed established rules of interpretation and deviated from the literal limitation on the appeal period. If the Tax Court decides a case and either party files a motion for a new trial or reconsideration, the time for appeal begins to run from the date of the disposition of the motion. This is true, even though the original decision is not changed and the statute says that appeal must be taken within three months from the date of the decision. In other words, the literal language of the statute is not followed and the decision does not become final upon the expiration of three months from the date of the decision. (See pages 30, 31 original Brief)

R. Simpson Company v. *Commissioner*, (1944) 321 U.S. 225, is the principal authority urged by the Government. In the *Simpson* case, established rules of judicial interpretation were followed part way. The statute states that a Tax Court decision becomes final "upon the denial of a petition for certiorari." The majority of the Court held that the decision did not become final upon the denial of the certiorari but upon

the expiration of the twenty-five days provided in the rules for filing petitions for rehearing. Mr. Justice Douglas, with whom Mr. Justice Murphy and Mr. Justice Rutledge concurred, dissented on the ground that the decision rested upon the Court's rule-making power and that the Court could grant petitions for rehearing at any time during the term. The reasoning of Mr. Justice Douglas seems logical because, under the Court's own rule, the time for filing a petition for rehearing may be shortened or enlarged by the Court, or a Justice thereof. It should be mentioned that, since the *Simpson* case, Sec. 452, Title 28, United States Code, has been amended to provide "The continued existence or expiration of a term of court in no way affects the power of the court to do any act or take any proceeding."

The *Simpson* case, as well as the *Northern Coal Company* case (1934) 293 U.S. 191, deals with the power of this Court to grant rehearings of denials of certiorari. The case at bar presents the first case considered by this Court dealing with the power of the Tax Court, as a trial court, to vacate a decision out of time for cause shown.

The law has always been that "* * * it is always in the power of the court to suspend its own rules, or to except a particular case from its operation, whenever the purposes of justice require it." *United States* v. *Breitling*, 20 Howard (61 U.S.) 252, 254.

Confusing statements are made at pages 22 and 26 of Respondent's Brief when it is said that the Commissioner is prohibited from making an assessment until a decision of the Tax Court has become final. Section 272 (a) (1) of the 1939 Code so provides, but

Section 1145,[1] 1939 Code, states that if a taxpayer appeals a Tax Court decision and does not file a bond approved prior to taking the appeal, the tax may be immediately assessed. In most appealed cases handled by counsel for petitioners, no bond is filed. Consequently, the tax is assessed and paid long before the decision becomes "final". This means that the revenue is fully protected when appeal is taken from a Tax Court decision because (1) a bond must be filed, or (2) if no bond is filed, the tax may be immediately assessed and collected. In addition, if the Commissioner believes the assessment or collection of a deficiency will be jeopardized by delay, he may assess and collect the deficiency at any time[2] except after a

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[1] Section 1145, Internal Revenue Code, 1939:

Bond to stay assessment and collection.

Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, the review under section 1142 shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Tax Court unless a petition for review in respect of such portion is duly filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed, has filed with the Tax Court a bond in a sum fixed by the Tax Court not exceeding double the amount of the portion of the deficiency in respect of which the petition for review is filed, and with surety approved by the Tax Court, conditioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts, or additions to the tax provided for by law, or (2) has filed a jeopardy bond under the income or estate tax laws. * * *

[2] Sec. 273 (a), Internal Revenue Code, 1939:

Jeopardy assessments

(a) Authority for making. If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

taxpayer has filed an appeal from a decision of the Tax Court.

Respectfully submitted,

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March 4, 1957

No. 371. LASKY ET VIR *v.* COMMISSIONER OF INTERNAL REVENUE. Certiorari, 352 U. S. 889, to the United States Court of Appeals for the Ninth Circuit. Argued March 7, 1957. Decided March 11, 1957. *Per Curiam:* The judgment is affirmed. *R. Simpson & Co.* v. *Commissioner*, 321 U. S. 225; *Helvering* v. *Northern Coal Co.*, 293 U. S. 191. MR. JUSTICE DOUGLAS dissents. *Robert Ash* argued the cause for petitioners. With him on the brief was *Carl F. Bauersfeld*. *Philip Elman* argued the cause for respondent. On the brief were *Solicitor General Rankin, Assistant Attorney General Rice, Leonard B. Sand* and *I. Henry Kutz*. Reported below: 235 F. 2d 97.